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VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 10

MAURICE E. TRAVIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 16, 1959
CERTIORARI GRANTED MAY 31, 1960

SUPREME COURT OF THE UNITED STATES

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[fol. 3]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Pleas and proceedings before The Honorable William Lee Knous, Chief Judge of the United States District Court for the District of Colorado, and The Honorable Jean S. Breitenstein, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

UNITED STATES OF AMERICA, Plaintiff,

vs.

MAURICE E. TRAVIS, Defendant.

No. 14,266, Criminal.

INDICTMENT—Filed October 28, 1954

The grand jury charges:

On or about the 26th day of December, 1951, Maurice E Travis, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, wilfully and knowingly make and use, and cause to be made and used, within the District of Colorado, a false writing and document, namely, an "Affidavit of a Non-communist Union Officer", (Form NLRB 1081), executed within the District of Colorado, on or about December 19, 1951, which false writing and document the said Maurice E. Travis filed and caused to be filed with the National Labor Relations Board in the City of Washington, District of Columbia, knowing the same to contain a false, fictitious and fraudulent material statement and representation, to-wit, that he, Maurice E. Travis, was not then and there a member of the Communist Party, whereas, as the said Maurice E. Travis well knew, he, Maurice E. Travis, was then and there a member of the Communist Party, in violation of Title 18, U.S.C., Section 1001.

Count Two

The grand jury further charges:

On or about the 26th day of December, 1951, Maurice E. [fol. 4] Travis, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, wilfully and knowingly make and use, and cause to be made and used, within the District of Colorado, a false writing and document, namely, an "Affidavit of Noncommunist Union Officer", (Form NLRB 1081), executed within the District of Colorado, on or about December 19, 1951, which false writing and document the said Maurice E. Travis filed and caused to be filed with the National Labor Relations Board in the City of Washington, District of Columbia, knowing the same to contain a false, fictitious and fraudulent material statement and representation, to-wit, that he, Maurice E. Travis, was not then and there affiliated with the Communist Party, whereas, as the said Maurice E. Travis well knew, he, Maurice E. Travis, was then and there affiliated with the Communist Party, in violation of Title 18, U.S.C., Section 1001.

Count Three (Dismissed 8/10/55)

The grand jury further charges:

On or about the 26th day of December, 1951, Maurice E. Travis, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, wilfully and knowingly make and use, and cause to be made and used, within the District of Colorado, a false writing and document, namely, an "Affidavit of Noncommunist Union Officer", (Form NLRB 1081), executed within the District of Colorado, on or about December 19, 1951, which false writing and document the said Maurice E. Travis filed and caused to be filed with the National Labor Relations Board in the City of Washington, District of Columbia, knowing the same to contain a false, fictitious and fraudulent material statement and representation, to-wit, that he, Maurice E. Travis, did not then and there support any organization that believed in or taught the overthrow of the United States Government by force, whereas, as the said Maurice E. Travis well knew, he, Maurice E.

Travis, did then and there support an organization, namely, the Communist Party, which as he Maurice E. Travis well knew, believed in and taught the overthrow of the United States Government by force, in violation of Title 18, U.S.C., Section 1001.

Count Four

The grand jury further charges:

[fol. 5] On or about the 3d day of December, 1952, Maurice E. Travis, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, wilfully, and knowingly make and use, and cause to be made and used, within the District of Colorado, a false writing and document, namely, an "Affidavit of a Noncommunist Union Officer", (Form NLRB 1081), executed within the District of Colorado, on or about December 3, 1952, which false writing and document the said Maurice E. Travis filed and caused to be filed with the National Labor Relations Board in the City of Washington, District of Columbia, knowing the same to contain a false, fictitious and fraudulent material statement and representation, to-wit, that he, Maurice E. Travis, was not then and there a member of the Communist Party, whereas, as the said Maurice E. Travis well knew, he, Maurice E. Travis, was then and there a member of the Communist Party, in violation of Title 18, U.S.C., Section 1001.

Count Five

The grand jury further charges:

On or about the 3d day of December, 1952, Maurice E. Travis, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, wilfully and knowingly make and use, and cause to be made and used, within the District of Colorado, a false writing and document, namely, an "Affidavit of a Noncommunist Union Officer", (Form NLRB 1081), executed within the District of Colorado, on or about December 3, 1952, which false writing and document the said Maurice E. Travis filed and caused to be filed with the National

Labor Relations Board in the City of Washington, District of Columbia, knowing the same to contain a false, fictitious and fraudulent material statement and representation, to-wit, that he, Maurice E. Travis, was not then and there affiliated with the Communist Party, whereas, as the said Maurice E. Travis well knew, he, Maurice E. Travis, was then and there affiliated with the Communist Party, in violation of Title 18, U.S.C., Section 1001.

Count Six (Dismissed 8/10/55)

The grand jury further charges:

On or about the 3d day of December, 1952, Maurice E. Travis, in a matter within the jurisdiction of the National [fol. 6] Labor Relations Board, an agency of the United States, did unlawfully, wilfully and knowingly make and use, and cause to be made and used, within the District of Colorado, a false writing and document, namely, an "Affidavit of a Noncommunist Union Officer", (Form NLRB 1081), executed within the District of Colorado, on or about December 3, 1952, which false writing and document the said Maurice E. Travis filed and caused to be filed with the National Labor Relations Board in the City of Washington, District of Columbia, knowing the same to contain a false, fictitious and fraudulent material statement and representation, to-wit, that he, Maurice E. Travis, did not then and there support any organization that believed in or taught the overthrow of the United States Government by force, whereas, as the said Maurice E. Travis well knew, he, Maurice E. Travis, did then and there support an organization, namely, the Communist Party, which as he Maurice E. Travis well knew, believed in and taught the overthrow of the United States Government by force, in violation of Title 18, U.S.C. Section 1001.

Earl C. Bartow, Foreman.

Donald E. Kelley, United States Attorney.
Filed Oct. 28, 1954.

IN UNITED STATES DISTRICT COURT

ARRAIGNMENT AND PLEA—Filed December 10, 1954

On November 3, 1954, The United States of America appeared by Donald E. Kelley, United States Attorney; and the defendant, Maurice E. Travis appeared in person and by his counsel, Samuel D. Menin and Eugene Deikman before the Honorable Jean S. Breitenstein, The United States District Judge for the District of Colorado; and the defendants made an oral motion for the continuance of arraignment and it was

Ordered that the oral motion of the defendant for continuance be denied. Thereafter the defendant waived the reading of the Indictment and entered his plea of Not Guilty as to all counts; and it was further

Ordered that the oral motion for reduction of bail bond be denied.

Entered Nov. 3, 1954.

[fol. 7]

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS INDICTMENT—Filed December 10, 1954

To The Honorable Jean S. Breitenstein, Judge Of The District Court Of The United States For The District Of Colorado:

The Defendant moves that the indictment and each count thereof be dismissed on the following grounds:

1. The Court is without jurisdiction because the indictment fails to charge that the alleged offenses were committed in the District of Colorado, and there is therefore no venue jurisdiction in this District.

2. The indictment fails to state facts constituting an offense against the United States committed in the District of Colorado.

3. The Court is without jurisdiction because the offenses, if any, are cognizable only in the District of Columbia.

4. The indictment does not state facts sufficient to constitute any offense against the United States.

5. Title 18, United States Code, Section 1001, as applied to the defendant in the indictment, and Title 29, United States Code, Section 159 (h) (pursuant to which the alleged false affidavits were allegedly executed, used and filed), on its face and as applied to the defendant in the indictment, are unconstitutional in violation of Article I, Section 9, clause 3, and the First, Fifth, Ninth, and Tenth Amendments to the Constitution.

6. As to Counts 3 and 6 of the indictment, the clause in the affidavit provided by Title 29, United States Code, Section 159 (h), to the effect that the affiant does not support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods does not have reference to the Communist Party, but only to other organizations which so believe or teach. Even if said clause does have reference to the Communist Party, it applies only to support of the doctrine of forcible overthrow, and not to support generally or without limitation as charged in Counts Three and Six. Counts Three and Six of the indictment therefore do not [fol. 8] state facts sufficient to constitute an offense against the United States.

7. Each count in the indictment is so vague and indefinite that it fails to inform the defendant of the nature of the charge against him with sufficient exactness so that he may prepare his defense.

8. The indictment does not state the essential facts constituting the offenses charged in that it fails to allege:

a. on what date the alleged false writing and document referred to in Counts 1, 2, and 3 was filed or caused to be filed with the National Labor Relations Board in the City of Washington, District of Columbia.

b. on what date the alleged false writing and document referred to in Counts 4, 5, and 6 was filed or caused to be filed with the National Labor Relations Board in the City of Washington, District of Columbia.

c. that at the times of the alleged offenses:

(1) the defendant was an officer of a labor organization within the meaning of the Labor-Management Relations Act of 1947.

(2) any of the alleged false statements were false in fact.

(3) with respect to Counts 1 and 4, when, where, in what manner, or by virtue of what facts, the defendant was a member of the Communist Party and well knew that he was then and there a member of the Communist Party.

(4) with respect to Counts 2 and 5, when, where, in what manner, or by virtue of what facts, the defendant was affiliated with the Communist Party and well knew that he was then and there affiliated with the Communist Party.

(5) with respect to Counts 3 and 6, when, where, in what manner, or by virtue of what facts, the defendant supported the Communist Party and well knew that he then and there supported the Communist Party.

[fol. 9] (6) with respect to Counts 3 and 6, when, where, in what manner, or by virtue of what facts, the Communist Party believed in and taught the overthrow of the United States Government by force.

(7) with respect to Counts 3 and 6, when, where, in what manner, or by virtue of what facts, the defendant well knew that the Communist Party believed in and taught the overthrow of the United States Government by force.

(8) with respect to Counts 3 and 6, when, where, in what manner, or by virtue of what facts, the defendant supported the Communist Party in its belief in and the teaching of the overthrow of the United States Government by force.

9. That the Grand Jury did not have sufficient competent evidence with which to indict the defendant in that the United States sought to present evidence before the Grand Jury against the defendant after the indictment was returned.

10. In addition to the insufficiency of the evidence before it, the Grand Jury considered matters wholly incompetent

as evidence, which matters could only have been presented to the Grand Jury in the form of hearsay.

11. The Grand Jury was not selected, drawn or summoned in accordance with the law, for the reasons that:

(a) There has been a systematic exclusion by the Clerk and Jury Commissioner of Negroes, Mexicans and other racial or minority groups.

(b) There has been a systematic exclusion of manual workers and wage earners.

(c) The representation of Negroes, Mexicans, other racial or minority groups, manual workers and wage earners has been limited to token representation.

(d) The Grand Jury has been weighted (sic) in favor of and dominated by representatives of the owner-manager groups of the community.

(e) The Clerk has failed to carry out the statutory and [fol. 10] constitutional mandate to employ such methods and procedures as would insure a representation of a cross-section of the community.

12. The indictment alleges only one offense in Counts One, Two, and Three, and only one offense in Counts Four, Five, and Six, to the prejudice of the defendant. If the indictment be not dismissed on this ground, the motion to compel election, filed simultaneously with this motion, should be granted.

Nathan Witt, Samuel D. Menin, Eugene Deikman,
Attorneys for Defendant.

Filed Dec. 10, 1954.

[fol. 12]

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION AND ORDER—March 15, 1955

Breitenstein, District Judge.

* * * * * * *

2. Venue.

Counsel for the defendant urge that venue is improperly laid in the District of Colorado and that the indictment can be maintained, if at all, only in the District of Columbia. Their contention is that Section 1001 of Title 18 applies to a "matter within the jurisdiction of any department or agency of the United States". The indictment here is predicated upon two affidavits allegedly filed with the National Labor Relations Board in Washington. The defense asserts that there was no matter within the jurisdiction of the United States until the affidavits were actually filed with [fol. 13] the Board in Washington. Hence, they say, the United States District Court for the District of Colorado has no jurisdiction.

The United States contends that 18 U.S.C. §3237 applies and that the offense was begun in Colorado and completed in Washington. Under this theory venue could be laid in either jurisdiction.

It should be noted that under the rules and regulations of the National Labor Relations Board the affidavit required by Section 159 (h) when made by officials of a national or international labor organization must be filed with the Board in Washington. Similar affidavits of officials of local labor organizations must be filed with the appropriate regional office of the Board. It is not denied that Travis is an official of an international labor organization and, hence, in his case the affidavit had to be filed in Washington.

Each count in the indictment charges that the defendant Travis did "make and use, and cause to be made and used, within the District of Colorado, a false writing and document, namely, an 'Affidavit of a Noncommunist Union Officer', (Form NLRB 1081), executed within the District of Colorado, * * * which false writing and document the said Maurice E. Travis filed and caused to be filed with the National Labor Relations Board in the City of Washington, District of Columbia".

During the argument Government counsel asserted that the affidavits were sent by mail from Denver to Washington and offered to furnish a bill of particulars as to the

mailing. This matter will be referred to later in discussion of the motion for a bill of particulars.

It is agreed that the defendant Travis is a resident of Denver, Colorado.

The basic contention of the defense is that there is no "matter within the jurisdiction of any department or agency of the United States" as required for there to be an offense under Section 1001, until the actual filing of the affidavits with the National Labor Relations Board in Washington (see United States v. Valenti, 3 Cir., 1953, 207 F. (2d) 242, 244; Hupman v. United States, 6 Cir., decided February 7, 1955—not yet reported).

[fol. 14] Section 159 (h) of 29 U.S.C. does not require the filing of an "Affidavit of Noncommunist Union Officer". It merely states that the National Labor Relations Board shall not take certain actions relating to a labor organization unless certain things, including the filing of non-Communist affidavits by the officers of the organization, are done. Obviously, for a labor union to be effective it is desirable that the union comply with Section 159 (h) so that it may avail itself of the facilities of the Board which are otherwise denied to it.

The filing by defendant Travis of the affidavits mentioned in the indictment was one step in satisfying the requirements of Section 159 (h). I am not impressed with the argument that certain other documents must be filed before the jurisdiction of the Board attaches. The failure of a union to do all things necessary under Section 159 (h) does not relieve a union officer from responsibility for a false affidavit.

The statute does not command, and the Board does not require a union officer to file a non-Communist affidavit. But if a union officer chooses to file such an affidavit, then that affidavit becomes a matter within the jurisdiction of an agency of the United States.

The question boils down to whether a prosecution under Section 1001 for making a false affidavit relating to a matter under Section 159 (h) can be brought only in the jurisdiction within which the affidavit is filed or whether under the continuing offense statute (18 U.S.C. §3237) it can also be brought in the jurisdiction where the affidavit was made, executed, and mailed.

The defense places primary reliance on the Third Circuit decision in Valenti, supra. In that case the indictment was laid under Section 1001 for filing a false non-Communist affidavit. The venue question was raised at trial in a motion for judgment of acquittal. The facts adduced were thus summarized in the concurring opinion (207 F. (2d) 246-247):

"Only the execution of the affidavit is shown to have occurred in New Jersey. There was no proof whether the defendant, who was the business agent of the union, mailed the affidavit in that district, or left it at the union office in Camden for transmission to the Board, or personally [fol. 15] delivered it to the regional office of the Board just across the river in Philadelphia. On the evidence, a choice of either of the first two alternatives, which would show venue in New Jersey, rather than the third, which would not, could have been achieved only by speculation. Hence the government failed to establish venue in the District of New Jersey * * *."

The majority of the Court in the Valenti case held (207 F. (2d) 244) that the false statement was not a matter within the jurisdiction of the Board "until the affidavit through its filing has become the basis for action by the Board", and, as the affidavit was required to be filed in Philadelphia, venue was not properly laid in New Jersey. It is significant that in Valenti there was no proof of mailing in the jurisdiction in which the trial was had.

Defense counsel present in support of their argument certain cases cited in Valenti. Reass v. United States, 4 Cir., 1938, 99 F. (2d) 752, was a prosecution in West Virginia for making a false statement to a Federal Home Loan Bank located in Pennsylvania. The evidence showed that the papers were prepared in Wheeling and taken by defendant in person to the office of the bank in Pittsburgh where the execution of the papers was completed and they were presented to the bank. The Court held that the crime occurred in Pittsburgh "where the writing previously prepared was presented to the bank" but significantly added (99 F. (2d) 755):

"We have no occasion in this case to consider whether the offense would have been cognizable in West Virginia, if the defendant had entrusted the application to the mails in Wheeling for delivery to the bank in Pittsburgh, for, as the evidence shows, he took the application in person to Pittsburgh and presented it to the bank."

In United States v. Borow, D. C. N. Jer., 1951, 101 F. Supp. 211, the indictment charged the making of false representations in a matter within the jurisdiction of the War Assets Administration. A stipulation disclosed that the documents were prepared in New Jersey and delivered by the defendant in person at the office of the War Assets Administration in New York. The Court held that venue was not properly laid in New Jersey and quoted at length from Reass, supra. The Court then, referring to Reass, said (101 F. Supp. 215):

[fol. 16] "It should be noted that the court expressed no opinion on what the situation might have been had the defendant mailed the false statement in West Virginia and I make a similar reservation in the instant matter."

Thus it is clear that Valenti Reass, and Borow are based on facts different from those existing in the case at bar. None of those decisions involves a situation where the false affidavit was made, executed, and mailed in one jurisdiction for filing with a governmental agency in another jurisdiction.

The Government contention is that the making, execution, and mailing of the Travis affidavits in Denver brings into operation the continuing offense statute and, hence, prosecution may be had either in Colorado or in the District of Columbia. The pertinent statute reads thus (18 U.S.C. §3237):

"Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

In my opinion the statute applies and prosecution can be had in either Colorado or the District of Columbia.

The making and execution of the affidavits in Colorado are undoubtedly preparation as in the Reass and Borow cases but the act of mailing is the beginning of the criminal offense. It effectively begins the criminal conduct just as does the pulling of the trigger of the gun or the mailing of poison in one jurisdiction to kill a person in another (cf. concurring opinion of Judge Hastie in Valenti, supra).

The act of mailing begins the offense in Colorado. The subsequent filing completes the offense in the District of Columbia. The mailing sets in motion the events which culminate in the commission of the offenses charged. The [fol. 17] commission of those offenses must necessarily be viewed in retrospect. The act of mailing is conduct of such a nature that the crime it is designed to effect will be committed if not extrinsically prevented. Here, according to the allegations of the indictment, the crime was committed. Speculation as to what the situation would be if the letters were lost in transit is beyond the point.

I am supported in my conclusion by the recent Fifth Circuit decision in DeRosier v. United States (decided January 18, 1955, Advance Sheets 218 F. (2d) 420). There, an indictment in Florida charged a violation of Section 1001 by the making of a false statement to the Loyalty Board in Washington. The statement was written, sworn to, and "sent" in Florida. The Circuit Court said (218 F. (2d) 423):

"Whether the letter was mailed or sent by some other agency, it is implicit in the verdict of the jury that, in addition to the signing and swearing to a false statement, the appellant put the false documents out of his possession and into some agency's custody for transmission to the Loyalty Board at Washington, D.C., all of which was done

by him in the Southern District of Florida. Consequently, the offense was begun in that district, and it became indictable either at the place of its beginning or at the place of its completion. In the Valenti case there was no proof of whether the false statement was mailed in the forum district or personally delivered in the filing district."

As I read United States v. Lombardo, 241 U.S. 73, 1916, it is not contrary to my conclusions. There the indictment in the State of Washington charged a failure to file a statement with the Commissioner General of Immigration in Washington, D.C. It was held that the case had to be prosecuted in the District of Columbia. In that case the crime was one of omission. To me it is clear that a prosecution for failure to file may only be brought in the jurisdiction where the filing must be made. In the case at bar the charge is of an affirmative act which began in Colorado and was completed in the District of Columbia.

My conclusion is also supported by the decision in United States v. Johnson, 323 U.S. 273, 1944. That involved an indictment under the Dentures Act. In holding that a prose- [fol. 18] cution of the sender must be brought in the state of the sending and cannot be brought in the state of the delivery the Court referred to the provisions of Article III, Section 2, Clause 3 and of the Sixth Amendment of the Federal Constitution, which require prosecution in the state and district in which the crime was committed, and said (323 U.S. 276):

"Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of the constitutional policy even though not commanded by it."

The defendant Travis lives in Denver, Colorado. A trial in this jurisdiction will be in the vicinage and will comport with the end sought to be attained by the Federal Constitution.

If in the case at bar the Government can sustain the burden of showing by evidence that the affidavits referred to in the indictment were made, executed, and mailed in Colorado, then in my opinion the offense began in Colorado and this Court has jurisdiction under Section 3237. The question of whether the evidence shows such facts is for consideration at the trial.

* * * * * * *

It Is Ordered that:

1. The motion to dismiss is denied.

2. The United States is required to furnish a bill of particulars as to the following matters:

(a) The dates of the mailing in Denver and of the filing in Washington of the affidavits mentioned in the indictment.

(b) The overt acts which constitute support of the Communist Party as charged in Counts 3 and 6 of the indictment.

3. Except as noted in 2 above, the motion for bill of particulars is denied.

[fol. 19] Dated at Denver, Colorado, this 15th day of March, A.D. 1955.

Jean S. Breitenstein, District Judge.

Entered on the docket March 15, 1955.

IN UNITED STATES DISTRICT COURT

ORDER—August 10, 1955

Upon oral motion of the United States made this 10th day of August, 1955, and the Court being fully advised in the premises,

It Is Hereby Ordered that Counts Three and Six, of the Indictment herein, be and the same are hereby dismissed.

Dated this 10 day of August, 1955.

Jean S. Breitenstein, United States District Judge.

Entered on the docket Aug. 10, 1955.

IN UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MANDATE

United States Of America, ss:

The President Of The United States Of America To The Honorable The Judges Of The United States District Court For The District Of Colorado. Greeting:

Whereas, lately in the United States District Court for the District of Colorado, before you, or some of you in a cause between The United States of America, Plaintiff; and Maurice E. Travis, Defendant, No. 14,266, Criminal, the judgment and sentence of the said district court in said cause, entered on February 15, 1956, was in the following words, viz:

On this 15th day of February, 1956, came the attorneys for the government and the defendant appeared in person and by Nathan Witt and Eugene Deikman, his counsel,

[fol. 20] It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of making a false statement in a matter within the jurisdiction of a Department of the United States, in violation of 18 U.S.C., Section 1001, as charged in Counts Nos. 1, 2, 4 and 5 of the Indictment herein, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years upon Count One of the Indictment, from and after this

15th day of February, 1956, and that the defendant pay to the United States of America a fine of $2000.00 upon Count One of the Indictment herein, and that the defendant shall stand committed to a common jail until payment of said fine or until he is otherwise discharged, as provided by law.

It is further adjudged by the Court that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years upon Count Two of the Indictment herein; it is further adjudged by the Court that the term of imprisonment hereby imposed upon Count Two of the Indictment herein shall run concurrently with the term of imprisonment imposed upon the defendant on Count One of the Indictment herein, and that the defendant shall pay to the United States of America a fine of $2,000.00 upon Count Two of the Indictment herein, and that the defendant shall stand committed to a common jail until payment of said fine or until he is otherwise discharged, as provided by law.

It is further adjudged by the Court that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years upon Count Four of the Indictment herein; it is further adjudged by the Court that the term of imprisonment hereby imposed upon Count Four of the Indictment herein shall run consecutively with the term of imprisonment imposed upon the defendant on Count One of the Indictment herein, and that the defendant shall [fol. 21] pay to the United States of America a fine of $2000.00 upon Count Four of the Indictment herein and that the defendant shall stand committed to a common jail until payment of said fine or until he is otherwise discharged, as provided by law.

It is further adjudged by the Court that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years upon Count Five of the Indictment herein; it is further adjudged by the Court that the term of imprisonment hereby imposed upon Count Five of the Indictment herein shall run concurrently with the term of imprisonment imposed upon the defendant on Count Four

of the Indictment herein, and that the defendant shall pay to the United States of America a fine of $2,000.00 upon Count Five of the Indictment herein, and that the defendant shall stand committed to a common jail until payment of said fine or until he is otherwise discharged, as provided by law.

It is further adjudged that Counts Three and Six of the Indictment herein, be and the same hereby are dismissed.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals, Tenth Circuit, by virtue of an appeal by Maurice E. Travis agreeably to the act of Congress, in such case made and provided, fully and at large appears:

And Whereas, at the May Term, in the year of our Lord one thousand nine hundred and fifty-seven, the said cause came on to be heard before the said United States Court of Appeals, on the transcript of the record from the said district court and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court for a new trial.

—July 15, 1957.

[fol. 22] You, therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the opinion and judgment as according to right and justice, and the laws of the United States, ought to be had.

Witness, the Honorable Earl Warren, Chief Justice of the United States, the 3rd day of September, in the year of our Lord one thousand nine hundred and fifty-seven.

Robert B. Cartwright, Clerk of the United States Court of Appeals, Tenth Circuit.

Filed Sept. 4, 1957.

IN UNITED STATES DISTRICT COURT

ORDER—November 1, 1957

This matter coming on for hearing on the request of the defendant for leave to file pre-trial motions, the defendant being represented by his attorneys, Eugene Deikman and Nathan Witt, and the plaintiff being represented by Donald E. Kelley, United States Attorney for the District of Colorado, and the Court being fully advised in the premises,

It Is Hereby Ordered that the defendant shall have until November 27, 1957, to file any motions not filed prior to the original trial of this cause.

It Is Further Ordered that all motions filed and orders entered thereon prior to the first trial shall stand and remain as part of the record as though similarly refiled and reordered prior to the retrial.

Dated this 1 day of November, 1957.

William Lee Knous, Chief Judge, United States District Court.

Entered Nov. 1, 1957.

[fol. 23]

IN UNITED STATES DISTRICT COURT

LETTER

Eugene Deikman
Attorney At Law
Suite 600 Mile High Center
Denver 2, Colorado
TA. 5-5405

January 10, 1958

Donald E. Kelley, Esq. United States Attorney, Post Office Building, Denver 2, Colorado

Dear Mr. Kelley: Re: U. S. vs. Travis. We hereby renew the offer to stipulate, made to you by Mr. Witt over the telephone on December 12, 1957, that the defendant, Maurice E. Travis, was a member of the Communist Party

during the period before August, 1949. More specifically, we offer to stipulate that the defendant, Maurice E. Travis, was a member of the Communist Party from 1941 to August, 1949, without prejudice to the right of the prosecution to attempt to prove that he was a member of or affiliated with the Communist Party in December, 1951, and December, 1952, or about such times.

Eugene Deikman, Nathan Witt, Attorneys for the Defendant, Maurice E. Travis.

ED/jeh

[fol. 24]

IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT AND, IN THE ALTERNATIVE, FOR A NEW TRIAL, AND FOR AN ORDER ARRESTING JUDGMENT—Filed February 11, 1958

Pursuant to Rules 29 (b) and 33 of the Federal Rules of Criminal Procedure, defendant moves for judgment of acquittal notwithstanding the verdict and, in the alternative, for a new trial, and, pursuant to Rule 34 of said Rules, [fol. 25] for an order arresting judgment, on the following grounds:

I. The Court was without jurisdiction because the indictment on its face discloses that the alleged offenses were not committed in the District of Colorado and there was therefore no venue jurisdiction in this District.

II. The Court erred in its denial of the motion to dismiss, made orally on January 28, 1958, during the course of the trial, on the ground that the oath given all the witnesses before the Grand Jury was illegal, improper, and of no effect in that it included an oath of secrecy in violation of Rule 6 (e) of the Federal Rules of Criminal Procedure and that, therefore, there was no sworn testimony before the Grand Jury as required by law.

III. In its order dated March 15, 1955, granting the motion for a bill of particulars in certain respects, the Court erred in denying the motion in all other respects.

IV. The Court erred in denying the motion addressed to the indictment to compel election between Counts 1 and 2 and between Counts 4 and 5, in denying the similar motion made at the close of the evidence, and in overruling defendant's objection, before the jury was discharged, to the verdict.

V. The evidence was insufficient in that there was no evidence whatsoever of materiality, an essential element of the offenses charged.

VI. The Court erred in rulings on objections to the admission and exclusion of evidence and in refusing to strike evidence, and various such rulings violated the First, Fifth, or Sixth Amendment to the Constitution and denied defendant a fair trial.

VII. The Court erred in denying the motions for a mistrial, and in refusing to strike evidence, as follows:

a) improper, irrelevant, prejudicial, inflammatory, and confusing testimony by the prosecution witnesses;

b) perjurious testimony by the prosecution witness, Kenneth Eckert, relating to one of counsel for defendant and by the prosecution witnesses, Kenneth Eckert and William [fol. 26] Mason, relating to the use of defendant of the word "church" as meaning the Communist Party, matters which counsel for the prosecution admittedly discussed with said witnesses before they took the stand; and

c) the erroneous, misleading, and deliberately prejudicial reference in the prosecution's argument to the jury to the discharge in 1946 of the "right wing" counsel for the International Union of Mine, Mill and Smelter Workers.

VIII. The evidence which went to the jury was further tainted in that the third prosecution witness, Fred Gardner, acknowledged on cross-examination that the testimony he gave under oath before the Senate Internal Security Sub-Committee in Cleveland in April, 1952, was knowingly, willfully, and deliberately perjurious.

IX. The Court erred in denying defendant's other motions for mistrial.

X. Section 3500 of Title 18, U.S.C., is unconstitutional on its face and as applied by the Court during the course of the trial. Even if otherwise constitutional, the respective rulings of the Court with respect to its application violated its meaning, intent, and purpose.

XI. The Court erred in its charge to the jury and in refusing to charge as requested by defendant.

February 11, 1958.

Respectfully submitted,

Nathan Witt (ED), Eugene Deikman, Attorneys for Defendant.

Filed Feb. 11, 1958.

[fol. 27]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL OR FOR NEW TRIAL AND FOR ORDER ARRESTING JUDGMENT—Entered March 18, 1958

Heretofore the defendant above named, through his counsel, requested permission to submit defendant's "Motion for Judgment of Acquittal notwithstanding the Verdict and, in the Alternative, for a New Trial, and for an Order Arresting Judgment" filed February 11, 1958, without argument. The plaintiff, through the United States Attorney, acquiesced in this request which the Court then approved.

The Court now having examined the files, records, and transcripts in said case, and being fully advised in the premises, it is

Ordered And Adjudged that the said Motion for Judgment of Acquittal, for a New Trial, and for an Order Arresting Judgment be, and the same is hereby denied. It is further

Ordered And Adjudged that this matter be set down for the pronouncement of sentence at 9:30 o'clock a.m., on March 28, 1958, at which time defendant, who is at liberty on bail, shall be present.

[fol. 28] Dated at Denver, Colorado, this eighteenth day of March, A. D. 1958.

William Lee Knous, Chief Judge.

Entered March 18, 1958.

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT—March 28, 1958

On this 28th day of March, 1958 came the attorney for the government and the defendant appeared in person and by Eugene Deikman, his counsel;

It Is Adjudged that the defendant has been convicted upon his plea of not guilty as to each of Counts 1, 2, 4 and 5 of the offense of making a false statement in a matter within the jurisdiction of a Department of the United States, in violation of 18 USC 1001, as charged in the Indictment herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years from this date upon each of Counts 1 and 2 of the Indictment herein, said terms of imprisonment to run concurrently.

It is further adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years upon Count 4 of the Indictment herein, said term of imprisonment to run consecutively with the

terms of imprisonment imposed upon each of said Counts 1 and 2 of the Indictment herein.

It is further adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years upon Count 5 of the Indictment herein, said term of imprisonment to run concurrently with the term of imprisonment imposed upon said Count 4 of the Indictment herein.

[fol. 29] It is further adjudged that the defendant shall pay to the United States of America a fine of $2,000.00 upon each of said Counts 1 and 4 of the Indictment herein, for a total fine of $4,000.00, and that the defendant shall stand committed to a common jail until payment of said fine, or until he is otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

William Lee Knous, Chief, United States District Judge.

Entered March 28, 1958.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed March 28, 1958

Maurice E. Travis, the appellant, resides at 3117 Ohio Street, Richmond, California.

His attorneys are Nathan Witt, address: P. O. Box 156, New York 23, New York; and Eugene Deikman, address: 600 Mile High Center, Denver 2, Colorado.

The appellant was charged by an indictment containing six counts, the third and sixth counts of which were dismissed by the United States District Court upon motion by the United States District Attorney. The remaining four counts of said indictment charged that the appellant had violated Title 18, United States Code, Section 1001, Count

One charging that in an "Affidavit of a Noncommunist Union Officer" made on or about December 19, 1951, within the District of Colorado and filed with the National Labor Relations Board in the District of Columbia, the appellant falsely swore that he was not a member of the Communist Party. Count Two charged that in the same affidavit he falsely swore that he was not affiliated with the Communist Party. Count Four charged that on or about December 3, 1952, he falsely swore in a similarly made and filed affidavit that he was not a member of the Communist Party, and Count Five charged that in the same affidavit he falsely swore that he was not affiliated with the Communist Party. [fol. 30] On February 5, 1958, the appellant was found guilty on all four counts above stated in a jury trial. The appellant filed a "Motion for Judgment of Acquittal notwithstanding the Verdict and, in the Alternative, for a New Trial, and for an Order Arresting Judgment" within the time required by law, which motion was denied by the District Court on March 18, 1958, a copy of the written order received in appellant's attorney's office on March 19, 1958 by mail. On March 28, 1958, a judgment of conviction was entered, and a sentence imposed as follows:

On Count One, four years and a fine of Two Thousand Dollars; on Count Two, four years, the sentence to run concurrently with that of Count One; on Count Four, four years and a fine of Two Thousand Dollars, the sentence to run consecutively with the sentence imposed on Counts One and Two; and on Count Five, four years, the sentence to run concurrently with that of Count Four. The total sentence was eight years' imprisonment and the total fine was Four Thousand Dollars.

The appellant is in the custody of the Attorney General of the United States, pending perfecting his appeal and the giving of an enlargement bond.

The appellant, Maurice E. Travis, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the above-stated judgment and sentence.

Dated: March 28, 1958.

Attorneys for Appellant: Nathan Witt (ED), Eugene Deikman.

Filed March 28, 1958.

IN UNITED STATES DISTRICT COURT

Transcript of Trial Proceedings

Proceedings had before Honorable William Lee Knous, Chief Judge, United States District Court, and a jury, in Denver, Colorado, at the Post Office Building, in Courtroom [fol. 31] A, on January 13, 1958, at 9:30 o'clock, a.m.

APPEARANCES: Honorable Donald E. Kelley, United States Attorney, District of Colorado; Robert A. Crandall, Esq., Attorney, Department of Justice; and Paul C. Vincent, Esq. Attorney, Department of Justice; appearing for the Government. Nathan Witt, Esq., and Eugene Deikman, Esq., Attorneys, appearing for the Defendant.

* * * * * * *

[fol. 42] KENNETH ECKERT, a witness called on behalf of the Government, testified:

Direct examination.

By Mr. Kelley:

Q. Will you state your name, please?
A. Kenneth Eckert.
Q. Where do you reside, Mr. Eckert?
A. Grosse Pointe, Michigan.
Q. And do you have a family?
A. Yes.
Q. And by whom are you employed?
A. The United Automobile Workers Union.
Q. What is your position with that union?
A. I am Assistant Director of the Die Casting Division, Department, rather.
Q. Die Casting Department?
A. Yes.

(Documents marked Government's Exhibits Nos. 1 to 6, inclusive, for identification.)

Mr. Kelley: Now, if the Court please, counsel for the parties have agreed as to certain facts in connection with Exhibits 1 to 6. In the first place, we are going to use the same numbers that were used in the prior trial on the exhibits so that it will not be necessary to remark them. We also used photostatic copies. However, we have the originals to introduce and then substitute the copies as we did previously. Also, in connection with these Exhibits 1 to 6 the facts which I am about to stipulate in reference to are as far as the stipulation goes, what I mean to say, counsel for both sides reserve any arguments of a legal nature pertaining to the exhibits. Have I correctly stated it?

The Court: What is the stipulation? What is the agreement?

Mr. Kelley: What I have said so far is our agreement up to this point I think.

Mr. Witt: Mr. Kelley has stated it correctly.

[fol. 43] The Court: I do not know what the agreement is.

Mr. Kelley: Well, that—

The Court: That they be admitted in evidence or what?

Mr. Kelley: Yes, that they be admitted in evidence, that Exhibits 1 to 6 shall be received in evidence. We first stipulate that it is not necessary to call a witness to lay foundations.

The Court: If you have stipulated they will be received in evidence, that is all there is to it. Is that what the fact is, Mr. Witt?

Mr. Witt: That is what the fact is if the Court please.

Mr. Kelley: There are some other things, your Honor. I was trying to get to it. The reason I prefaced my remarks was because of an occurrence at the last trial. Now, I will take each exhibit and proceed with our stipulation as to each exhibit.

The Court: All right.

As to Exhibit No. 1, it is stipulated that the signature M. E. Travis appearing thereon is the signature of Maurice E. Travis, the defendant in this case. It is further stipulated

that Exhibit 1 was notarized on December 19, 1951, that it was mailed or caused to be mailed by the defendant on December 21, 1951 to the National Labor Relations Board, Washington, D.C., that it was received by the National Labor Relations Board and filed on December 28th 1951.

As to Exhibit No. 2, it is stipulated that Exhibit No. 2 is the cover letter for Exhibit No. 1, and that it accompanied Exhibit No. 1.

As to Government's Exhibit No. 3, it is stipulated that it is a carbon copy of a letter acknowledging receipt of Exhibits 1 and 2 by the National Labor Relations Board and was received by the International Union of Mine, Mill & Smelter Workers here in Denver.

As to Exhibit No. 4, it is stipulated that the signature [fol. 44] M. E. Travis appearing thereon is the signature of the defendant, Maurice E. Travis, that it was notarized on December 3rd 1952 in the City and County of Denver, that Exhibit No. 4 was mailed or caused to be mailed by Maurice E. Travis to the National Labor Relations Board on December 3rd, 1952, and that it was received by the National Labor Relations Board and filed there on December 4, 1952, and that Exhibit No. 5 is a cover letter relating to Exhibit No. 4 and that it was mailed and received at the same time as Exhibit No. 4 by the National Labor Relations Board.

As to Government's Exhibit No. 6 it is stipulated that it is a copy of the letter written by the National Labor Relations Board on December 8, 1952 to the International Union of Mine, Mill & Smelter Workers, acknowledging receipt of Exhibits 4 and 5. It is further stipulated that all said exhibits shall be received in evidence, and copies be substituted therefor.

Mr. Witt: Your Honor, I could easily be mistaken, but if I followed Mr. Kelley correctly despite the fact that he said he would try to use the same exhibit numbers, I think he gave them in a slightly different order. Perhaps we should check that so there will be no confusion in the record.

The Court: We wish to keep the record straight, Mr. Kelley, and of course I am not familiar with the exhibits. What do you have to say about Mr. Witt's suggestion?

Mr. Kelley: I don't think I made a mistake. He thinks I gave the wrong numbers, describe the wrong numbers on them.

Mr. Witt: If you will give me a moment to check, Your Honor.

The Court: You might check because we wish to keep the record straight.

Mr. Kelley: I am just as interested as he is, Your Honor.

Mr. Witt: My impression was incorrect, Your Honor. Mr. Kelley used the same exhibit numbers.

The Court: Then it is correct the way it stands?

[fol. 45] Mr. Witt: Yes.

The Court: Very well; does the Government wish to move for the admission of these exhibits now?

OFFERS IN EVIDENCE

Mr. Kelley: I did, Your Honor, I will renew the offer.

The Court: You said it was stipulated they might be admitted in evidence.

Mr. Kelley: I move that they be admitted in evidence.

The Court: And I gather there is no objection?

Mr. Witt: No objection.

The Court: So those exhibits which are numbered from 1 to 6 inclusive, as I understand it, will be admitted in evidence, is that right?

Mr. Kelley: That's right.

(Government's Exhibits 1 through 6, inclusive, were received in evidence.)

Mr. Witt: As Mr. Kelley said, Your Honor, and this is important to us, especially from the point of view of the venue issue, of course, that we stipulate only to these documents, to the fact of these documents and not to any legal conclusions or legal effect.

The Court: That they are admitted in evidence, and of course whatever inferences or conclusions there are will be a question for the jury.

Mr. Kelley: It is further stipulated that the International Union of Mine, Mill & Smelter Workers filed with the National Labor Relations Board and the Department of Labor all other documents required by law for compliance with Sections 9 (f, g and h) of the Labor-Management Relations Act of 1947.

Mr. Witt: So stipulated.

The Court: Very well.

[fol. 46] Mr. Kelley: It is further stipulated that the making and filing of an affidavit of the non-Communist officer is a matter within the jurisdiction of the National Labor Relations Board and that the National Labor Relations Board is an agency of the United States.

Mr. Witt: So stipulated.

The Court: Very well.

Mr. Kelley: Now, if it please the Court, I would like to read from the exhibits.

The Court: Very well, you may do so.

Mr. Kelley: Exhibit No. 1, "United States of America, National Labor Relations Board, Affidavit of non-Communist Officer. The undersigned, being duly sworn deposes and says, one, I am a responsible of the union named below; two, I am not a member of the Communist Party or affiliated with such party."

Now, as to three, Your Honor, I am going to ask that three be blocked out on the photostat for the reason that it might be within Counts 3 and 6 which have been dismissed, and I presume counsel would agree to that.

Mr. Witt: We have no objection.

The Court: Very well then; I understand you wish to withdraw these and substitute photostatic copies and then in the photostat omit some matter in this Exhibit 3?

Mr. Kelley: Yes, that's right.

The Court: Very well.

Mr. Kelley: "Full name of union including local name and number, International Union of Mine, Mill & Smelter Workers, signature, M. E. Travis, 412 Tabor Building, Denver, Colorado, subscribed and sworn to before me this 19th day of December, 1951," a notary public. The name of the notary is there; I don't think it is necessary to read that to you.

[fol. 47] Now, the part of the exhibit I have just read is known as Form NLRB 1081, and then the other part of the exhibit is Form NLRB 1080, and is certificate of union officers. The titles of all the officers and the names of all officers of the union and the date of the expiration of the term of each officer are as follows: "Title of Office, President, John Clark; expiration date"—on all of them it is December 31, 1953.

"Vice-President, Orville Larson; Vice-President, Charles H. Wilson; Secretary-Treasurer, M. E. Travis; Board Member, District 1, William Mason; District 2, C. D. Smotherman; District 3, Raymond Dennis; District 4, vacant; District 5, Alton Lawrence; District 6, Albert Pezzati; District 7, Chase J. Powers; District 8, Nels Phebol.

"I am an official of the union; certify that this information is true to the best of my knowledge and belief, International Union of Mine, Mill & Smelter Workers, 421 Tabor Building, Denver, Colorado, date, December 15, 1951," and signed John Clark.

Mr. Witt: Excuse me, if the Court please. May I talk to Mr. Kelley a moment? It may clear something up and save time.

(Counsel confer out of the hearing of the jury and the reporter.)

Mr. Kelley: May it please the Court, apparently this Form 1080 which I have read from which listed the officers of the union and which is referred to in Exhibit 2 as having accompanied it, and is one of the papers covered by the stipulation that all other papers were filed, was not actually introduced in evidence at the last trial, and we ask to withdraw that form or detach it from our exhibit and ask that the jury be instructed to disregard the reading of that.

The Court: I don't know whether the jury can identify what you are talking about.

Mr. Kelley: I just read to them the names of the officers and stated the time when their office expired.

[fol. 48] The Court: That portion is to be disregarded by the jury and you will be permitted to physically detach from—what is the exhibit number?

Mr. Kelley: That is Exhibit No. 1.

The Court: —from Exhibit No. 1 the item you are talking about and it will not be received as an exhibit, this attached sheet. The remainder of Exhibit 1, of course, will remain in evidence.

Mr. Kelley: The same is true as to Exhibit No. 4, although I haven't reached that point yet.

The Court: You better detach the sheet and also I might say that there was some other matter you mentioned a moment ago that you didn't want to incorporate it in the exhibit. The way the record stands they have been admitted in evidence now, and, of course, the jury hasn't seen the exhibits. You have read from portions of them but there should be immediately substituted a photostatic copy for that exhibit you are talking about that has material that you do not wish to have included in it.

Mr. Kelley: We will do it before it is handed to the jury.

The Court: Very well.

Mr. Witt: Will Your Honor instruct the jury, although it is kind of confusing—

The Court: The jury will disregard this portion of the exhibit that Mr. Kelley just read about the names of the officers and expiration date of their terms. I think that's what it amounted to.

Mr. Witt: Yes, everything pertaining to what Mr. Kelley referred to as Form NLRB 1080.

Mr. Kelley: Right.

The Court: Yes.

Mr. Kelley: Exhibit No. 2. This is on the letterhead of [fol. 49] the International Union of Mine, Mill & Smelter Workers dated December 21, 1951. "Mr. Claude B. Calkin, Affidavit Compliance Officer, National Labor Relations Board, Washington 25, D.C. Dear Sir: In connection with the filing requirements of the Labor-Management Relations Act, 1947, we enclose NLRB Form 1080, certificate of union officers and Forms NLRB 1081, the notarized affidavits of our officers and executive board members. Very truly yours, John Clark, President."

Exhibit No. 3, which is a carbon copy of a letter dated January 8, 1952, addressed to Mr. John Clark, President, International Union of Mine, Mill & Smelter Workers, Suite 412, Tabor Building, 16th and Curtis, Denver 2, Colorado. "Dear Mr. Clark: This will acknowledge receipt of your letter of December 21, 1951, enclosing compliance material submitted in accordance with the filing requirements of Section 9 (f), (g) and (h) of the Labor Management Relations Act, 1947.

"The National Labor Relations Board will consider your organization in compliance with Section 9(f) and (g) of the Act until June 30, 1952, and under Section 9 (h) until December 7, 1952, provided there are no intervening changes in your officers.

"Our Regional and Sub-Regional Offices have been notified of your renewal of compliance.

"This, of course, does not cover your local organizations. Each local must separately meet the above filing requirements of the Act in order to enjoy its benefits.

"We will give you 30 days advance notice, whenever possible, of pending expiration of compliance as reflected by our records. We assume no responsibility for notification as it is your obligation to keep this material up to date. Very truly yours, Claude B. Calkin, Affidavit Compliance Officer."

Exhibit No. 4 is the affidavit, it is Form NLRB-1081. "Affidavit of NonCommunist Union Officer. The undersigned, being duly sworn, deposes and says: 1. I am a responsible officer of the union named below. 2. I am not a member of the Communist Party or affiliated with such party."

And, three, we ask to block that out on the photostat as [fol. 50] we do with Exhibit No. 1.

"International Union of Mine, Mill & Smelter Workers," signed "M. E. Travis, 3456 Decatur Street, Denver, Colorado." And it is notarized on the 3rd day of December, 1952.

Exhibit No. 5 is a letter on the letterhead of the International Union of Mine, Mill & Smelter Workers dated December 3, 1952, addressed, "National Labor Relations Board, Washington 25, D. C. Gentlemen: In accordance with the provisions of the Labor-Management Relations Act, 1947, we enclose herewith Form NLRB 1080, Certificate of Union Officers and Affidavits of Non-Communist Union Officers signed by the officers of our organization. Very truly yours, John Clark, President."

Exhibit No. 6 is a carbon copy of a letter dated December 8, 1952, addressed to Mr. John Clark, President, International Union of Mine, Mill & Smelter Workers, Suite 412,

Tabor Building, 16th and Curtis, Denver 2, Colorado. "Dear Mr. Clark: This will acknowledge receipt of your letter of December 3, 1952, enclosing material submitted in accordance with the filing requirements of Section 9 (f), (g) and (h) of the Labor Management Relations Act, 1947.

"The National Labor Relations Board will consider your organization in compliance with Section 9 (f) and (g) of the Act until June 30, 1953, and under Section 9 (h) until November 18, 1953, provided there are no intervening changes in your officers.

"Our Regional and Sub-Regional Offices have been notified of your compliance.

"This, of course, does not cover your local organizations. Each local must separately meet the above filing requirements of the Act in order to enjoy its benefits.

"We will give you 30 days advance notice, whenever possible, of pending expiration of compliance as reflected by our records. We assume no responsibility for notification as it is your obligation to keep this material up to date. Very truly yours, Robert Frazer, Affidavit Compliance Officer."

Q. Mr. Eckert, have you ever been a member of the Communist Party of the United States?

A. Yes.

Q. And about when did you become a member of the Communist Party?

[fol. 51] A. Well, sometime back about 1931 is as close as I can recall.

Q. How long did you remain a member of the Communist Party?

A. Why, I remained a member of the Communist Party until 1948. There were two intervening periods, however, that technically I suppose I was not a member of the Communist Party here.

Q. And what were those two periods?

A. Well, the first period I was out of the country for about 14 months, and the second period I was in the Army of the United States, and my membership was not active.

Q. Now, during the period of your membership in the Communist Party did you have occasion to attend any Communist Party schools?

Mr. Witt: Your Honor, we object to this, and we object to this whole line Mr. Kelley is opening up. We think we are familiar with the line although Mr. Kelley may not necessarily be following the same course as he pursued with this witness in the first trial. In any event, this is a basic objection, your Honor, which will affect not only the testimony of this witness but at least two other witnesses, so that I am sure Mr. Kelley will agree with me that at this point your Honor would probably want to hear some argument.

Mr. Kelley: Well, your Honor, I do not know whether you want to hear argument or not, but I think that we would—we understand that Mr. Witt would want a continuing objection to the type of question propounded.

The Court: What is the objection? I do not know what the objection is. What is the objection, Mr. Witt?

Mr. Witt: Your Honor, it appears already from the testimony of this witness that he left the Party in 1948. The charges in this case relate to the years 1951 and 1952, and, therefore, we object to any testimony from this witness about his own biography or about the Communist Party covering the period from 1931 to 1948 on the ground of remoteness. Secondly, your Honor, as your Honor heard me say in my opening statement, we have offered the prosecution a stipulation to the effect that the defendant was a member of the Communist Party during the period until 1949. The only relevant testimony that this witness can possibly give about Travis, and, if he were asked, he [fol. 52] would say he never spoke to Travis or had anything to do with him after 1948 after this witness says he left the Communist Party, the only testimony this witness could give would go to the period from 1931 to 1948.

Now, we offered that stipulation on this occasion, your Honor, even though we didn't on the first occasion, because we weren't then aware of what kind of a case the Government would make when we went to trial the first time, but now that we know we offer this stipulation in order to remove any possible excuse for testimony from this witness or any other witness about Travis's membership in the Communist Party before 1949.

Now, in light of our offer to stipulate we can see no possible reason for testimony from this witness about Travis covering the period from 1931 to 1948 or whenever it is except the prosecution's anxiety to inject prejudicial, inflammatory testimony into this record, and to seek to influence this Jury improperly. Furthermore—

Mr. Kelley: May it please the Court, if counsel is going to make a Jury argument—

Mr. Witt: I am not finished.

Mr. Kelley: I think we should go into Chambers if he is going to make a Jury argument.

Mr. Witt: This is not a Jury argument.

The Court: I understand his position is that there is no controversy in the case under their admissions here with respect to the situation prior to 1949. Is that what I understand?

Mr. Witt: Exactly.

Mr. Kelley: That is his position, your Honor, but—

Mr. Witt: I have several other branches to my argument I would like to conclude.

The Court: I have the basis of your objection. What is the Government's position about what makes this material? [fol. 53] Mr. Kelley: The Government's position is this: It is not for the defense to suggest to the Government how they put on their case.

The Court: The Government has to bring in relevant testimony. If it is not relevant—

Mr. Kelley: It is relevant. It is comparable to this situation: You put an expert medical individual on the stand who has great qualifications about what he testifies to, and the defense says, "We will stipulate he is qualified."

The Court: There is no analogy there at all.

Mr. Kelley: There is in my opinion.

The Court: There is a question of relevance as to time. If it is charged that a man has a certain status on a certain date, what I am trying to find out is how far back of that date you can go to show the same status. That is what it amounts to.

Mr. Kelley: We had the same issue originally in the case in the first instance except they didn't make the offer to stipulate. Now, they don't offer to stipulate everything we

put in by our witnesses. Now, the Government's, one of the rules, and there is an instruction in the case on it, relates to a state of mind or a condition which the Government shows to exist prior to the act which constitutes the crime, and we show that it exists and the extent to which it exists.

The Court: There isn't any question of state of mind in this case, is there?

Mr. Kelley: Well, whether or not he was a Communist at the time he signed his affidavit.

The Court: That is a fact.

Mr. Kelley: All right, a fact, and we have to prove that he was a Communist during the periods alleged in the indictment. Well, this is not the kind of case where you can go down to the City Hall and find out that he is registered as a Communist and prove that he was a Communist on that [fol. 54] date, and the reason we go into the prior, part of the reason we go into this prior history is to show the extent to which he adhered to the Communist Party and to show and to convince the Jury that that condition continued all during this period of the indictment period. We also use this testimony—

The Court: This is prior to the indictment period this witness is going to talk about.

Mr. Kelley: That's right, and this testimony was all admitted in the first trial. Then in addition to that, your Honor, this witness is qualified as an expert, and this is part of the background and the qualifications for his testifying as an expert.

The Court: Well, expert as to what?

Mr. Kelley: Well, first, as to the role of the Communist Party in labor unions.

The Court: Is that an issue in this case?

Mr. Kelley: Yes, sir, and it was a question that he was permitted to answer on the last trial, and as to this matter of whether or not you can resign from the Communist Party.

The Court: Well, I gather that is in issue, but I didn't know the first phase of the thing was in issue.

Mr. Kelley: Well, it was a matter which—it is an issue, yes, your Honor, because that is one of the facets of the case, is the role of the Communist Party in the trade union movement.

Mr. Witt: Will your Honor hear me?

The Court: Well, I think probably the best way to do, of course, I am not expert about what this witness intends to testify about, is that maybe it better be reached by specific objection if the question comes up, because I think some of it on the basis of what I have heard would probably be admissible. Some of the rest I have some question about, and I think maybe we had better proceed by questions and answers, and you can object when the question is made. Your objection goes to the witness testifying further. Well, there may be a half a dozen things or a dozen things or more that would be entirely relevant that I know nothing about. [fol. 55] So, I think I can judge the thing better if I hear the question and then you make your objection at that time. I do not think there is a blanket objection to his testifying.

Mr. Witt: May I say this?

The Court: Yes.

Mr. Witt: It happens, your Honor, that, if the witness were permitted now by the Court to answer the pending question, we would be in the very heart of the problem which we are addressing ourselves to. In answer to this question, unless the witness has changed his testimony from the first trial, the witness will make highly prejudicial and inflammatory statements which we think, if we are right, would entitle us to a mistrial and, we, therefore, think that your Honor should give us the opportunity to argue this point as fully as we want not only because, as I indicated before, it pertains to all of the testimony of this witness but because it pertains also to all of the testimony of two other witnesses. So, it is obvious that this issue is very basic to the course of this trial and to the legal issues involved. I have a good many things to say in answer to Mr. Kelley, and I think your Honor should hear me, because we will be in real difficulty if this man is permitted to make his speech from the witness stand.

* * * * * * *

[fol. 65] The Court: My impression after hearing all this discussion here is somewhat similar to what I said in the courtroom before we recessed. I feel, as I have said three

or four times in here, that the Government has the right to prove that Mr. Travis, or offer their evidence which they think will establish the fact that Mr. Travis was a member of the Communist Party. I think they can cover the period when he became a member, show the continuity of his membership, and culminate it by offering the evidence they have by showing that he was a member of the Communist Party at the time these affidavits were allegedly made for the purpose of establishing, as they contend, if they can so [fol. 66] establish, that the affidavits were false.

Now, it has been indicated here by both sides and the Government's statement and in Mr. Witt's opening statement to the jury that at some point along here—I am not clear as to the date—Mr. Travis filed what he designates as a resignation or took some steps that amount to a resignation, and his position is that, "While I was a member of the Communist Party," as I understand the admissions here up to that time, "then resigned and after that, and at the time I made these affidavits I was not a member of the Communist Party," and the Government has a right to offer any evidence that they have that they think would establish the fact that he was in fact a member of the Communist Party at this time, and that naturally would get into the question of whether his resignation was effective and all of those things.

Now, I am quite clear on those general principles that the Government has a right to go into those fields. I am not so clear about this expert matter at all, but the sum total of what my present thinking is that I couldn't sustain a blanket objection to this witness testifying any further. I think the blanket objection to his testimony will have to be overruled. That, of course, is without prejudice to the defendant to make specific objections as these questions arise; but, in general I think the Government has a right to proceed to establish the fact that I have mentioned.

Now, I don't know how much collateral substance there is in this or anything, and I think counsel are familiar with his testimony, and I think objections can be made on that basis, but I feel that the general motion to just say that this

witness can't offer any testimony at all has to be overruled.

. . . . . .

[fol. 73] In Open Court

KENNETH ECKERT, resumed the stand, and testified as follows:

Direct examination.

By Mr. Kelley (Continued):

Q. I believe that at the time of the interruption that I had [fol. 74] asked you if during the period of your membership in the Communist Party if you attended any schools or classes.

A. Yes.

Q. You did?

A. Yes.

Q. And will you name the schools and the periods when you attended them, please?

Mr. Witt: We object to this question, your Honor, on the ground that we have already stated on the record.

The Court: The objection will be overruled. You may proceed. I do not know what he is going to testify to. Proceed.

A. I attended the Party's classes and schools in Toledo, Ohio, Camp Robinhood, Ohio, and Moscow in the Soviet Union.

MOTION TO STRIKE AND MOTION FOR MISTRIAL AND OVERRULING THEREOF

Mr. Witt: If the Court please, we move to strike the witness's answer, and we also move for a mistrial on the ground that the injection of the witness's attendance at a school in Moscow is entirely irrelevant in this case and has the effect of inflaming the jury, confusing the issues, and denying the defendant a fair trial.

The Court: The motion will be overruled, both motions, the motion to strike and the motion for a mistrial subject to your right to renew the motion to strike, and I think, Mr.

Kelley, you had better proceed to the period showing the alleged affiliations you assert of the defendant here with the Communist Party. I think as a preliminary matter that there may be some question about this testimony, and I will permit them to renew their motion to strike. I think you had better proceed on that phase of the case.

Mr. Kelley: The Government then after the Court has resolved that question, we can come back to laying the foundation?

The Court: Yes, and how it is resolved. But at the moment I think in light of our discussion that the testimony should have reference to the membership of the defendant in the Party and those things and within the scope of this witness's knowledge. So, you may proceed on that basis, and we will give consideration to this motion to strike later on.

[fol. 75] Mr. Kelley: All right, your Honor.

Q. Are you acquainted with the defendant, Maurice E. Travis?

A. Yes.

Q. Do you see the defendant in the courtroom?

Mr. Witt: We agree that the witness has known the defendant and could identify him.

The Court: Well, he can proceed to do it. He can say whether he is in the courtroom. You can answer the question.

Mr. Kelley: I think all we wanted to do is the record to show that the witness can identify the defendant and that the Mr. Travis that he talks about in his testimony is this defendant. That is all we have in mind.

The Court: All right.

Q. When did you first become acquainted with Mr. Travis?

A. The first time that I recall meeting Mr. Travis was about 1942 as near as I can recall.

Q. And where did you meet him?

A. In Los Angeles.

Q. That is Los Angeles, California?

A. Yes.

Q. Now, at that time, Mr. Eckert, what is the fact as to whether or not you held a position with a labor union?

A. I did hold a position with a labor union.

Q. And what was that union?

A. Just about this time I was Co-ordinator of the Mine, Mill & Smelter Workers in southern California.

Mr. Witt: Your Honor, perhaps at this time the record should show that the defendant has a continuing objection to all of this witness's testimony on the ground of remoteness and on the further ground of relevancy in view of the fact that the witness has testified that he left the Communist Party in 1948.

The Court: Well, the objection may be noted.

Mr. Witt: If we have objections on other grounds, we will make them.

[fol. 76] The Court: Yes, very well. You may continue, Mr. Kelley.

Mr. Kelley: I do not know whether there is a question pending or not. Was there?

The Court: I think he answered it, but I may be mistaken.

Q. Now, Mr. Eckert, at that time were you connected with the Mine, Mill & Smelter Workers or was it the National Association of Die Casting Workers at that time?

A. Well, the National Association of Die Casting Workers was in the process of merging with the Mine, Mill & Smelter Workers, and my memory is not exact whether the first meeting was just prior to the actual merger or afterward.

Q. When you say you were Co-ordinator that was at the time you met Mr. Travis, is that correct?

A. Yes.

Q. And at this particular time were you a member of the Communist Party of the United States?

A. Yes.

Q. And do you know what position Mr. Travis held at that time?

A. Mr. Travis was the Co-ordinator of the Mine, Mill & Smelter Workers in northern California.

Q. Now, during this—how long did you remain in California approximately?

A. From that time until, well, until I went in the Army in 194—very early in 1944 I believe it was.

Q. Now, during this period while you were in California did you participate in Communist Party functions and activities?

A. Yes.

Q. Now, do you know of your own knowledge whether or not Mr. Travis was a member of the Communist Party at that time?

A. Yes.

Q. And did you or did you not in the course of your Communist Party activities come in contact with Mr. Travis?

A. Yes.

Q. During this period from 1941 or '42 when you arrived in California until you went in the Army did you have any Communist Party assignment in the National Association of Die Casting Workers and in Mine-Mill after the merger?

Mr. Witt: I am sorry, your Honor, I was waiting for the next question in order to raise a question about a prior question that Mr. Kelley asked. Mr. Kelley asked the witness whether he had anything to do—I may not be phrasing it exactly—with the defendant in connection with these Communist Party activities, and I waited to see whether [fol. 77] Mr. Kelley would follow up that answer after the witness answered "yes", but he didn't. I now move to strike that answer, and I object to the question, because it calls for a conclusion of the witness, and it doesn't give us the testimony as to facts, dates, places, incidents, and that kind of thing.

The Court: I think the objection will be overruled. I assume Mr. Kelley will go into detail in respect to what conduct there was. He is simply asking if he knew or if that happened. He didn't go into detail, or course. The objection will be overruled.

Q. Do you know of your own knowledge whether or not Mr. Travis had a Communist Party assignment during this period from 1942 until the time you went into the Army?

A. Yes.

Q. And will you tell what that was?

A. One assignment that he had that I had knowledge of was to carry on the Communist Party work inside the Mine, Mill & Smelter Workers in northern California.

Q. Now, and was this the same type of work that you were doing in the Die Casting Division or in your union activities?

A. Yes.

Q. And did the type of work you were, each of you were doing cause you to come in contact with Mr. Travis?

A. Yes, occasionally.

Q. Now, directing your attention to this period of time I will ask you whether or not you had a conversation with Mr. Travis after the merger of the National Association of Die Casting Workers and Mine-Mill in which the subject of the conversation was one Allen McNeal.

Mr. Witt: I object to the question, it is entirely too leading. Mr. Kelley has asked other leading questions, but we do not want to object continually.

The Court: In some aspects the question is leading. It might have been asked in another form. But I think counsel is doing it to save time. I see no prejudice in the form of the question. The objection will be overruled. Did he answer the question?

Q. What is the answer as to whether or not there was a conversation?

A. Yes, there was.

Q. Now, where did this conversation take place?

[fol. 78] A. It took place in Los Angeles.

Q. And do you recall whether or not there was anyone else present at that time?

A. My recollection is that the staff member, Jack Marcotti, was there. I don't recall whether anyone else was there or not.

The Court: When was this conversation? I haven't heard any date.

Mr. Kelley: I beg your pardon.

The Court: When, I say?

Mr. Kelley: It was—

The Court: I never heard the witness say anything about it.

Q. Do you recall when this conversation took place?

A. Well, the conversation took place in 1942 after we had merged the two labor organizations in California, the Die Casters and Mine-Mill.

Q. Now, can you—do you know whether or not Jack Marcotti was a member of the Communist Party at that time?

A. Yes.

Q. Will you relate the substance of the conversation that was had at that time and ascribe the remarks that were made to whoever made them? First, if you will, state what, if anything, Mr. Travis said at that time.

A. The substance of the conversation stated by Mr. Travis was there was a person in Denver by the name of Allen McNeal who was the Administrative Assistant to the President of the Mine, Mill & Smelter Workers, Mr. Robinson, and that Mr. McNeal was the ranking Communist Party official inside the Mine, Mill & Smelter Workers and that, if I received instructions from Mr. McNeal regarding Communist Party work inside the Mine, Mill & Smelter Workers, that I should accept that as authoritative instructions regarding Communist work in the Union.

Q. Now, I believe you testified, Mr. Eckert, that from early in 1944 until sometime in 1945 you were in the United States Army, is that correct?

A. That is my best recollection as to the date.

Q. Do you recall about when you got out of the Army?

A. Well, in 1945 in the fall.

[fol. 79] Q. In the fall?

A. Yes.

Q. Now, after you were discharged from the Army where did you go to take up your residence?

A. Cleveland, Ohio.

Q. And what was your occupation or your position at that time?

A. Well, my immediate status at that particular time was to renew my services on the staff of the Mine, Mill & Smelter Workers, and my recollection is that I did call the President of the Union regarding the matter, and my recollection is that he stated that I should, would resume my status that I had before I went into the Army as a staff member in the Mine, Mill & Smelter Workers.

Q. Did there come a time during this—well, strike that. Did your work again bring you in contact with Mr. Travis?

A. Yes.

Q. Now, during this period from the time you were discharged from the Army in 1945 up until sometime in 1948 did you hold any positions other than as a staff member with the Mine-Mill Union?

A. Yes.

Q. And will you state what positions those were?

A. I was Chairman of the Die Casting Division of the Union and a member of the International Executive Board.

Q. Now, directing your attention to this same period of time following the war do you recall the organization of a committee known as the "Steering Committee"?

Mr. Witt: Your Honor, we object to this question and this entire line on a different ground than the one on which we have our continuing objection. This witness is apparently prepared to testify that he knew the defendant as a member of the Communist Party from the time he first met him in California in 1942 until he, the witness, left the Communist Party in 1948. As we have already indicated, there is no dispute in this case about the defendant's having been a member of the Communist Party during that period, and the only purpose of this testimony is, again, to inject prejudice and irrelevant issues and confusion.

To illustrate, your Honor, Mr. Kelley has already asked the witness about that conversation in which the defendant referred to Allen McNeal. What possible relevance does that piece of testimony have in its bearing on whether the defendant was a member of the Communist Party in 1951 or '52 or was affiliated with the Communist Party those times especially since there is no dispute that in 1942 the defendant was a member of the Communist Party? And, in [fol. 80] addition, this testimony has the effect of seeking to indict a good many other people. The witness has already mentioned other names. The witness has already continually referred to Mine-Mill so that other people's names are being brought into this proceeding, the name of the Union is being brought into this proceeding for no relevant and proper purpose.

Mr. Kelley: Would the Court care to hear an answer to that?

The Court: The objection will be overruled. You may proceed.

Q. Mr. Eckert, I asked you if you recalled the organization of a group known as the "Steering Committee".

A. Yes.

Q. And do you recall about when that was organized?

A. Well, my best recollection is that it was organized early in 1946.

Q. Do you know—well, first, let me ask you this: What is the fact as to whether or not Maurice Travis was a member of the Steering Committee?

A. Maurice Travis was a member of the committee.

Q. And who else were members of that committee?

A. Al Skinner, Chase Powers, and myself.

Q. Now, was this an official organization of the Mine-Mill Union?

A. No, it was not.

Q. Will you state what the Steering Committee was?

A. The Steering Committee was a committee designated by the Communist Party to co-ordinate the work of the Communist Party inside the Mine, Mill & Smelter Workers.

Q. Now, did you state about when the committee was organized? Did I ask you that?

A. Yes.

Q. I missed the answer. Will you repeat it, please?

The Court: He said in 1946.

A. I said that was my best recollection, early in 1946.

Q. And where was the committee organized?

A. In Chicago, Illinois.

Q. And was there any meeting in connection with the organization of this committee?

A. Yes, there was.

Q. And where did that take place?

A. It took place in the City of Chicago. I don't recall the exact location.

Q. Do you recall who was present at the time the com-

[fol. 81] mittee was set up?

A. Well, some of the people present were John Williamson, Gil Green, Maurice Travis, Chase Powers, Al Skinner, Mr. Fred Fine, a Mr. Sanderson, Harold Sanderson were among those attending that meeting.

Q. Now, will you tell the Court and the Jury who Chase Powers was at that time?

A. International Executive Board member for the West Coast Area of the Mine, Mill & Smelter Workers.

Q. And who was Al Skinner at that time?

A. Al Skinner was Regional Director of the Mine, Mill & Smelter Workers or at least the Die Casting Division of it in Chicago.

Q. Now, I believe you mentioned the name of John Williamson. Will you state who he was at that time?

A. He was the National Trade Union Secretary of the Communist Party of the United States.

Q. And you mentioned the name of Gil Green. Who was he?

A. He was the Illinois State Secretary of the Communist Party.

Q. And Fred Fine?

A. He was the Illinois Trade Union Secretary of the Communist Party.

Q. You also mentioned a Mr. Sanderson. Can you state who he was?

A. Sanderson was Administrative Assistant to Reed Robinson, the President of Mine-Mill.

Q. What is the fact as to whether or not all of those who were present at that meeting were members of the Communist Party?

A. They were all members of the Communist Party.

Q. Now, Mr. Eckert, do you recall any statement made at that meeting by Mr. Travis?

A. Yes, I recall the substance of a statement.

Q. Will you state the substance as you recall it?

A. The substance was a statement stressing the necessity and importance of establishing some kind of a national committee of Communists inside the Mine, Mill & Smelter Workers that would be able to effectively co-ordinate the work of the Communists inside Mine-Mill and prevent in

the future some of the confusion that had resulted in the past as to Communist Party work in the Union.

Q. Now, did this committee—well, let me ask you this: How long to your knowledge did this committee continue to exist within Mine-Mill?

A. Well, the committee was in existence at the time that, well, shortly after the time before I left the Mine, Mill & Smelter Workers in 1948.

Q. So that all during the time of your connection with the Union from the date of the committee's organization [fol. 82] until the time that you left Mine-Mill the committee continued to exist?

A. Why, I have knowledge of a period shortly before I left, the last meeting of the Steering Committee before I left, which was just a short time before I left, but I have no knowledge after that meeting.

Q. Yes. That would be sometime in 1948?

A. Yes.

Q. Now, during the existence of the committee, during your knowledge of its existence what is the fact as to the frequency with which the committee met and whether it was frequent or infrequent?

Mr. Witt: We object to that as calling for a general statement of the witness. Mr. Kelley might ask him about what particular meetings there were if he wants to, but we cannot cross-examine the witness if he is permitted to answer that question.

The Court: The effect of the question is simply asking him how many meetings within his knowledge did the committee have. That is what the question is, isn't it?

Mr. Kelley: Yes.

The Court: I think the objection will be overruled.

The Witness: What is the question?

(The reporter read the last question.)

A. The committee met very frequently.

Q. Now, basing your answer—

Mr. Witt: If the Court please, we move to strike that answer because it is meaningless.

The Court: I think it will stand. I think your objection goes to the weight. There is nothing very certain about what "frequent" may mean. That may mean one thing to the witness and another thing to counsel. I think it will be a question for the Jury. The objection will be overruled, and the motion to strike will be denied.

[fol. 83] Q. Now, of the meetings—well, first, let me ask you, did you attend all of the meetings of the Steering Committee?

A. No, I think there were some meetings that I was not present.

Q. Of those in which you were in attendance can you say whether or not Mr. Travis was present at those meetings?

Mr. Witt: We object to this on the same ground, your Honor. Mr. Kelley is asking a whole series of general questions.

The Court: I think I will sustain the objection on the form of the question. Ask him how many meetings that he knows Mr. Travis attended or something of that sort.

Q. Can you estimate, Mr. Eckert, about how many meetings of the Steering Committee that you attended where Mr. Travis was present? Are you able to make an estimate?

A. I don't think I can, Mr. Kelley. There were so many meetings—

Mr. Witt: I move to strike that statement of the witness. I know from past experience this witness is in the habit of doing it when he wants to inject prejudicial testimony.

Mr. Kelley: I think that is an improper statement of counsel.

The Court: The witness had not completed his answer. Proceed to make your answer, Mr. Eckert.

Mr. Kelley: I think it should also be made clear that this witness made an honest answer to the question.

The Court: Well, the record shows, but he had not completed the answer.

Q. Did you have something further you wished to say?

A. Yes, I did, Mr. Kelley. I could only guess. I don't think I can hazard a guess as to the number of meetings.

Mr. Witt: I renew my objection to strike the witness's statement that there were so many meetings he attended that he can't remember.

[fol. 84] The Court: The objection will be overruled or will be denied, and the motion to strike will be denied.

Q. Who usually presided at the Steering Committee meetings?

A. Mr. Travis usually presided.

Q. If he didn't preside, who did preside at those meetings?

A. At some of the meetings where Gil Green or John Williamson was present or some other ranking Communist official sometimes they presided.

* * * * * * *

[fol. 95] Direct examination.

By Mr. Kelley (Continued):

Q. May it please the Court, ladies and gentlemen of the jury: Mr. Eckert, as I recall, at the time of the recess we had just covered the formation and membership of the Steering Committee. Now, I would like to ask you whether or not other persons than the members of the Steering Committee attended the meetings from time to time?

A. Yes.

[fol. 96] Q. And who would these other people be who would attend the Steering Committee meetings?

Mr. Witt: I object, Your Honor. We don't see any relevance in who these other people were.

The Court: He has gone into the attendance, and he enumerated a number of people there. This apparently goes to the question of someone who was there who were not members of the committee. I think it should be established, though, that the defendant was there at the time these other people were there, or something of that sort, to show knowledge on his part; otherwise I don't believe it would be admissible.

Mr. Kelley: Now, Your Honor, I can't see that it is too important one way or the other, except I would like to say it is in the nature of a foundation question, and we have already shown that at all of the meetings, or at most of the meetings at least—

The Court: That's different; he didn't say at all the meetings. He said generally, or something like that, Mr. Travis was present and presided. Now, whatever special occurrence took place, if you wish to emphasis that, would naturally have to be at some meeting that Mr. Travis was present so that there could be some notice imputed to him of the transaction.

Mr. Kelley: That isn't the purpose of this question at all; it is more of a foundation to show the use of the committee within the Mine-Mill, and I won't go into any particular uses until we show who attended different meetings. Of course, it will be brought out when we take each individual meeting, as far as that goes, and be covered in that manner, if counsel prefers that.

Mr. Witt: Counsel does prefer that.

The Court: I will sustain the objection to the question in its present form on the basis I have indicated, because anything is going to have to be connected with the defendant or shown that he had knowledge of it by some process. I understand you can't put all your evidence in at once, but there must be some connection shown between him and the transaction you have in mind, and this question standing alone in the light of the witness' previous state-
[fol. 97] ment might relate to a time when the defendant was not even present or an occurrence of which he had no knowledge.

Mr. Kelley: I will withdraw the question, Your Honor.

The Court: All right.

By Mr. Kelley:

Q. Do you know, Mr. Eckert, whether or not prior to the time of the creation of the Steering Committee, whether or not Communist Party members on the executive board control the executive board of Mine-Mill?

Mr. Witt: Object to it on the same grounds as the last question, on the ground Your Honor indicated. Nothing

in this question indicates any connection with the defendant.

Mr. Kelley: We will connect it up, Your Honor.

The Court: Executive board of what or who?

Mr. Kelley: Of the Mine-Mill union.

The Court: On your statement it will be connected up I will overrule the objection, but if it isn't it will be stricken on motion.

Mr. Kelley: Yes, Your Honor.

Mr. Witt: May we have the question read back, Your Honor?

The Court: Read the last question, Mr. Watson.

(The last question was read by reporter.)

Mr. Witt: We thought we had another objection; I think we do, Your Honor. That question is ambiguous in view of the use of the word "controlled." The word "controlled" would mean something different to different people, and it is one of these loose words that creeps into these cases that doesn't advance us any, and that permits the introduction of evidence which isn't tied in with the defendant, and which will mean different things to different members of the jury.

[fol. 98] The Court: I think the objection will be overruled. I think that goes to the question of the weight and can be developed on cross examination, so the objection will be overruled on the latter form.

A. Yes, I have such knowledge.

Q. And will you state what the fact was in that regard?

A. Prior to that time, about that time of the formation of the Steering Committee the vote on the Mine-Mill executive board was evenly divided between the Communist faction and the anti-Communist faction—

Mr. Witt: I am sorry to have to interrupt the witness, but his answer already seems to me highly improper that I feel compelled to interrupt the witness. The witness is going to make a speech, which again I say will be meaningless. He is talking about Communist factions and anti-Communist factions. He hasn't named the defendant. Nobody knows what a faction is, as far as this record is con-

cerned nobody does, so all that he has done thus far is start to make a stump speech, and he is not on the witness stand to make a stump speech to attack the defendant or Mine-Mill; he is to give evidence as to what he knew, what he saw, and what he heard.

The Court: The objection will be overruled, and as I say, the Government has announced that this evidence will be connected up either through the testimony of this witness or other witnesses with the defendant, and I am assuming that that will be done, so the objection will be overruled. You may continue with your answer. You can read to him the answer as far as he gave it.

(The reporter read from his notes as follows:)

"A. Prior to that time, about that time of the formation of the Steering Committee the vote on the Mine-Mill executive board was evenly divided between the Communist faction and the anti-Communist faction—" And therefore the Communists were not able to effectively control the union.

By Mr. Kelley:

Q. Now, as I recall your testimony before the noon recess you stated that the Steering Committee was organized in the early part of 1946, is that correct?

A. I said that, as I recall, to the best of my recollection, that it was organized sometime in early 1946. There is a [fol. 99] possibility it might have been the last of 1945; it was about this period.

Mr. Witt: I am sorry, Your Honor, we didn't realize Mr. Kelley was going to another subject. We now to (sic) move to strike the witness' answers culminating in the answer about the two factions, because there is nothing in that that we can see that is relevant to this case. He didn't mention the defendant in any way; there is just no connection.

The Court: Well, Mr. Kelley assured the Court that the matter would be connected up. He can't put all of his evidence in this one question or one answer or by one witness, and if when their evidence is completed the matter

isn't connected up you may renew your motion to strike, but at the moment the motion will be denied.

Q. Now, directing your attention, Mr. Eckert, to February, 1946, I will ask you whether or not there was a Steering Committee meeting held immediately prior to a Mine-Mill executive board meeting.

A. There was a Steering Committee meeting held immediately prior to a meeting of the International Executive Board about that time. I am not sure it was February; it was early in the year.

Q. Now, will you state, if you recall, the place where this Steering Committee meeting was held?

A. Well, it was held in Chicago; I don't recall the exact location.

Q. Now, will you state who was present at the Steering Committee meeting?

A. Among those that I recall being present in addition to the members of the Steering Committee, Maurice Travis, Chase Powers, Al Skinner and I, Harold Sanderson. I don't recall the specific individuals who may have been there; I know that it was a large meeting, but I don't recall the names of all the other individuals.

Mr. Witt: I move to strike the witness' remark that it was a large meeting, which again is typical of this witness. He will say either there was a large meeting or there were many others present, or he will throw in a general statement in order to exaggerate his testimony and to prejudice the defendant, and I think he should be cautioned to stop that.

Mr. Kelley: May I suggest to the Court that it is perfectly all right for counsel to make objections, but I don't believe that he has any right when the witness is on the [fol. 100] stand to attempt to impeach him by his own statements as to something that has gone on before, and I think he should be cautioned on that.

The Court: I am going to let the answer stand, but I think the witness should not volunteer information, and of course the use of these words like "frequent" and "large" and words of that kind are not very significant. I think it goes to the weight of the witness' testimony, but you

asked the witness to name those who were present at that meeting, and this latter part that Mr. Witt is talking about came as a volunteer portion to an answer to your question.

Mr. Kelley: Well, except this, Your Honor, that he is pointing out to the Court and the jury that he can remember at this time certain ones who were there and there were others that were there whose names he doesn't immediately recall.

The Court: But, that wasn't your question; you asked him to name those who were there. He can name those he recalls and say that others were there. If the size of the meeting is of moment you can ask him numerically, not large, small, or something else, but the point I am making is that it will save a lot of difficulty, I think, if the witness confines his answers to your questions.

Mr. Kelley: Very well, Your Honor.

By Mr. Kelley:

Q. In addition to those whom you have specifically named as being present were there others in attendance at the meeting?

A. Yes.

Q. Now, I believe you stated that Mr. Travis was there at this meeting?

A. Yes.

Q. And will you state what the purpose of this meeting was?

A. Well, the principal purpose was to decide on the steps that were to be taken by the Communists inside the executive board of Mine-Mill to begin the change in the, well, in the Communists' work inside Mine-Mill specifically.

Q. Now—

A. I haven't finished.

Q. Excuse me.

A. Specifically to discharge the attorney, the general counsel of Mine-Mill at that time, Willard Morris, to move the vice-president of the union, Ralph Rasmussen, from the Chicago office to Washington, and to make other organizational changes in order to improve the work of the Communist Party inside the union.

[fol. 101] Mr. Witt: I am sorry, Your Honor. I move to strike the witness' answer. There is nothing in that answer that connects defendant with any of that in any way. Let him tell and answer Mr. Kelley's questions as to what happened insofar as the defendant is concerned.

The Court: I am going to sustain the motion to strike and the jury will disregard the answer. The question, I think wasn't objected to. You said, "What is the purpose of the meeting?" It has been testified that Mr. Travis was there. What we are interested in is what happened there, not what the preconceived purpose was or something else, so you can reframe your question, and the question and answer will be disregarded by the jury.

What we want to know is what took place there. This may have been the witness' notion about what the purpose was and it may have never developed at the meeting. Ask him what was done at the meeting.

By Mr. Kelley:

Q. Mr. Eckert, do you recall who presided at that meeting?

A. Well, the state secretary of the Communist Party was there and—

The Court: He asked you if you knew who presided at the meeting, and it will avoid a lot of difficulty if you save your conjectures for your own consideration and answer the question. If you don't know, say you don't know.

A. Well, I am not sure who presided at the meeting.

Q. Now, do you recall whether or not Mr. Travis made any statements at that meeting?

A. Yes.

Q. And will you relate the substance of Mr. Travis' remarks at that time?

A. The substance was that, "Now, with having the majority of the votes on the executive board it was necessary to reverse the actions taken by the other group on the board that had been done previously at a Pittsburgh meeting, and to make these changes which would make it possible to carry on this work more effectively in Mine-Mill," the changes I referred to earlier.

Q. Did Mr. Travis—

Mr. Witt: I move to strike that last comment, because Your Honor struck the witness' reference to those changes. [fol. 102] The Court: Well, the (sic) purportedly is what Mr. Travis said, as I understand it, isn't it?

Mr. Kelley: No, he was referring to some changes and I think they were in the question, and I think probably the jury should just—it has no significance, the remarks that are objected to.

The Court: Read the question again, Mr. Watson.

(The last question was read by the reporter.)

The Court: That part, "the changes I referred to earlier," can be stricken out.

Q. Now, did Mr. Travis make any statement in reference to what specific changes should take place at that time?

A. Yes.

Q. And will you state what those were?

A. He was directing the substance of his remarks, the changes of moving Willard Morris, discharging Willard Morris as general counsel of the union, moving the vice-president's office, Ralph Rasmussen, from Washington to Chicago, and certain staff changes which were to be made.

Q. Now, Mr. Eckert, I believe that I detected in your testimony that the first time you mentioned the transfer of Mr. Rasmussen that you said from Chicago to Washington, and this time from Washington to Chicago. Now, which is the fact as to that?

A. From Washington to Chicago.

Q. Thank you. Now, will you state whether or not Mr. Rasmussen was a member of the Communist Party at that time?

Mr. Witt: Object to it; no relevance to the issues in this case.

The Court: What is the relevancy, Mr. Kelley?

Mr. Kelley: We have been talking about the purpose of this Steering Committee and the control of the union, and the answer that is elicited on that question will show on which side of the fence Mr. Rasmussen was and clear up the picture a little better for the jury.

Mr. Witt: As I see it, it would merely confuse the jury [fol. 103] further. As far as this man's testimony to this point is concerned, all that the jury has been told is that Travis thought that Rasmussen should be moved from Washington to Chicago. It is a meaningless statement in that context. All it means is that the suggestion was made that instead of the vice-president of the union having offices in Washington they should have them in Chicago, so how it would throw any light on that to have this witness tell us now whether or not Rasmussen was a member of the Communist Party?

Mr. Kelley: We would be very glad to develop that for you.

The Court: He can answer that; the objection will be overruled.

A. He was not a member of the Communist Party.

Q. Now, was any statement made by anyone at that meeting as to why Mr. Rasmussen should be transferred from Washington to Chicago?

Mr. Witt: Object to it as calling for hearsay, Your Honor.

The Court: You should add to the question Mr. Travis' presence or something. I think you are assuming he was there, but he identified him as being there, but it wouldn't be admissible unless it was made in his presence.

Mr. Kelley: Well, I don't know whether there was anything said on that subject yet. I think we have to determine that first. If there wasn't there is no use finding out if anyone was there. All I have asked him is whether or not there was a statement made.

The Court: All right, he can answer the question yes or no.

A. Yes.

Q. Now, at the time that this statement was made was Mr. Travis still at the meeting?

A. Yes.

Q. Who made the statement?

A. The statement was made by Mr. Travis.

Q. And will you state what the remarks were in regard to [fol. 104] Mr. Rasmussen?

A. The substance of the remarks was that Ralph Rasmussen's office in Washington enabled him to come in contact with a considerable number of local union leaders of Mine-Mill who had occasion to have union business in Washington, and this was enhancing the prestige of Mr. Rasmussen, and that his office should be moved from there to Chicago.

Q. Where were the national offices of the Mine-Mill union at that time?

A. In Chicago.

Q. Now, what is the fact as to whether or not the general counsel, Mr. Morris, whom you mention, was a member of the Communist Party, to your knowledge?

Mr. Witt: Same objection as to the question.

The Court: The objection will be overruled.

A. He was not.

Q. Now, following this Steering Committee meeting about which you have just testified, did you attend an executive board meeting?

A. Yes, I did.

Q. And I am referring to the executive board of Mine-Mill when I use the words "executive board."

A. That's what I understood it to mean, Mr. Kelley.

Q. And where was this executive board meeting held?

A. It was held in Chicago.

Q. And was Mr. Travis present at the executive board meeting?

A. Yes.

Mr. Deikman: May we have a date, Your Honor?

Mr. Kelley: This was immediately following the Steering Committee meeting which he had just testified to.

Mr. Deikman: Immediately?

Mr. Kelley: Well, that's one of those words that you can interpret differently; it might have been.

Mr. Witt: Well, Mr. Kelley—

The Court: I think they have a right to have the time fixed. If there is any question about that ask him how soon after the meeting, and when with respect to the meeting, or something in days.

[fol. 105] Mr. Witt: This witness has testified on at least five occasions as to the date of that meeting, so Mr. Kelley can ask him what the date was or what the month was.

The Court: You can inquire; fix the time some way.

By Mr. Kelley:

Q. How long after your executive board meeting was this executive board meeting, after your Steering Committee meeting, I mean?

A. My recollection is that the executive board meeting followed the Steering Committee meeting by not more than a day or so; I don't recall exactly.

Q. Now, at that time what was Mr. Travis' position with the Mine-Mill union?

A. Well, to the best of my recollection at that particular time he was working as an assistant to the president.

Q. Now, was he present at the executive board meeting that we are talking about?

A. Yes.

Q. Now, did the executive board take any action at that meeting in reference to the matters about which you have testified occurred at the Steering Committee meeting?

A. Yes.

Q. And what action was taken in that regard?

A. The general counsel was discharged. Mr. Rasmussen's office was moved to Chicago and his assignment changed. Those were the two main things that I recall.

Q. Now, Mr. Eckert—do you have an objection, Mr. Witt?

Mr. Witt: No, Mr. Kelley.

Q. —directing your attention to the spring of 1946, I will ask you if you recall a meeting which was held at the Russian Co-operative Restaurant in Chicago, at a place above the Russian Co-operative Restaurant?

A. Yes.

Q. And can you place the approximate date of that meeting?

A. No, other than to the best of my recollection it was in May.

Q. Now, do you know who called the meeting?

A. Yes.

Q. And who called it?

A. The meeting was called by the Communist Party Steering Committee.

Q. By the Steering Committee?

A. Yes.

Q. Now, at this meeting will you state some of those who were present? First let me ask you this question: About how many attended that meeting?

A. Well, to the best of my recollection there must have been—I think there was seventy-five or more, maybe slightly less, around that figure.

[fol. 106] Q. Now, will you tell me some of those who were present?

A. The members of the Steering Committee, Maurice Travis, Chase Powers, Al Skinner and myself, Harold Sanderson, Bernard Stern, Leon Gorelick, Irving Dichter, Alex Berlint, William Gately; these are some of the names that I can recall at the moment.

Q. Now, I don't think that in your previous testimony in this trial that you mentioned the name of a Mr. Stern. Will you—did you have an objection, Mr. Witt?

Mr. Witt: No, I am just listening, Mr. Kelley; I am sorry.

Q. Will you state who Mr. Stern was at this time?

A. Mr. Stern was the research director of the union.

Q. And what, if you know, was his status as to being a member of the Communist Party?

A. Yes, he was.

Q. You mentioned the name Gorelick, and I think it is for the first time. What was his position?

A. He was executive secretary of Mine-Mill Local 700 in Los Angeles, California.

Q. Do you know whether or not he was a member of the Communist Party?

A. He was.

Q. You mentioned a person by the name of Gately. What position did he hold, if any?

A. He was an international representative of the union.

Q. And do you know whether or not he was a member of the Communist Party?

A. Yes.

Q. And was he?

A. Yes.

Q. Now, what kind of a meeting was this? You said there were seventy-five or more there. What was the composition of the people who were there?

A. They were all members of the Communist Party who were either officers of Mine-Mill, staff members, local union officers, or in some cases rank and file members of the union.

Q. And from whence did they come?

A. They came from throughout the entire jurisdiction of the union, the United States and Canada.

Q. Now, do you recall who presided at this meeting?

A. It is my recollection that Mr. Travis presided.

Q. Now, do you recall whether or not Mr. Travis made any statement at the time he opened the meeting?

A. Yes.

Q. And will you state what he said at that time?

A. The substance of Mr. Travis' statement was that this meeting had been called to bring together the Communist [fol. 107] Party members in the Mine-Mill & Smelter Workers, or at least a considerable number of them, to acquaint them with the changed situation in the union and the efforts being made to increase the role of the Communist Party in the union, and specifically that a so-called ten point program was being submitted to the meeting to be discussed by them, and if adopted to be subsequently presented to the convention of the international union to be held sometime later that year in Cleveland.

Q. Now, what action, if you recall, was taken on this program that was submitted by Mr. Travis at that meeting?

A. The program was adopted by the meeting.

Q. Now, do you know whether or not the program that was adopted at that meeting was later submitted to the executive board of the Mine-Mill union?

A. Yes, it was.

Q. Now, I believe you said that the purpose of the program was to submit, if adopted by the Board, to submit it to the convention upcoming in Cleveland, is that correct?

A. Yes.

Q. Now, this is still 1946, is it not?

A. Yes.

Q. Do you recall about when the convention was held in Cleveland?

A. My recollection is the early fall of 1946.

Q. Now, at about the time that the convention was held were there any Steering Committee meetings?

A. Yes.

Q. And do you recall any that occurred immediately prior to the convention?

A. Yes.

Q. Do you recall where this particular Steering Committee meeting was held?

A. The first one that was held prior to and during the convention, my recollection is it was in the Hollanden Hotel in Cleveland.

Q. Now, who was present at this meeting?

A. John Williamson, Maurice Travis, Powers, Skinner and myself. I think Harold Sanderson was there. There might have been a few others, but that's all I can recall.

Q. Now, Mr. Eckert, you mentioned John Williamson. Will you state who John Williamson was at this time, that is, at the time of this meeting?

The Court: He already has testified to that.

Q. Have you testified to John Williamson?

A. Yes.

Q. During the year 1946 have you testified as to his position?

The Court: I don't know whether it was 1946, but he testified as to who he was when he mentioned his name in a former meeting.

[fol. 108] Mr. Kelley: Well, his position has changed a time or two. Whether it changed during this period I don't know, Your Honor.

Mr. Witt: I object to that statement of Mr. Kelley's and move that it be stricken.

The Court: It will be stricken.

Mr. Kelley: I can't ask him who Williamson was at the time of this meeting?

Mr. Witt: We have no objection to that, Your Honor.

The Court: Yes, he can answer that question.

The Witness: He was National Trade Union secretary of the Communist Party.

By Mr. Kelley:

Q. Now, did Mr. Travis make any statements during this meeting in the Hollanden Hotel?

A. Yes.

Q. And will you state the substance of the remarks that he made?

A. The substance of Mr. Travis' remarks was that he agreed with the proposals of Mr. Williamson pertaining to the selection of and supporting of candidates who were to run for international office at the convention which was pending in Cleveland.

Q. Was there anything said by Mr. Travis specifically as to who were to run for officers of the Union at that time?

A. Yes.

Q. And will you state what he said in that regard?

A. In substance Mr. Travis stated that he supported the proposal made by Mr. Williamson to endeavor to obtain a candidate to run for International Secretary-Treasurer who had not been identified with the Communist faction in the Union but who could be expected to not support the attempts of the anti-Communist faction to remove the then President of the Union and certain other officers at that time and discussed the candidacy of other candidates for the office—offices that were to be filled by the convention or to be nominated at the convention, rather.

Q. Now, Mr. Eckert, as a result of this Steering Committee meeting was a program adopted to present to the convention?

A. Yes.

Q. And did that, can you state whether or not that [fol. 109] program carried out the suggestions of John Williamson that were made at that time and about which you have testified?

A. Yes, they were.

Q. Now, I will ask you if you recall any statements made by Mr. Williamson at that time.

A. Yes.

Q. And will you state what he said at that time, and I will ask you further, was Mr. Travis still present when this statement was made?

A. Well, the substance, some of the statements made by Mr. Williamson while Mr. Travis was present was this matter of trying to get a person to run for Secretary-Treasurer, the type of person I previously described. Mr. Williamson also stated that he could not remain in Cleveland, he had to leave, but that Gil Green, who was the Party person, Communist Party person responsible for work in Mine-Mill, that he would be in town and that the Steering Committee would be able and should meet further with Mr. Green and take instructions from him.

Q. Now, what is the fact as to whether or not the program adopted in the Steering Committee was carried out at the convention?

A. Well, basically it was with some exceptions, one notable exception.

Q. Have you finished your answer?

A. Yes.

Q. Now, Mr. Eckert, did the Mine-Mill Union hold a convention in the year 1947?

A. Yes.

Q. And did you attend that convention?

A. Yes.

Q. Do you know whether or not Mr. Travis attended that convention?

A. Yes, he did.

Q. Now, do you recall approximately when this St. Paul convention was held?

Mr. Witt: The witness hasn't testified that the convention was held in St. Paul.

The Court: No, that's right.

Mr. Witt: I move to strike Mr. Kelley's testimony.

The Court: It will be stricken.

Q. Do you know where the 1947 convention was held, Mr. Eckert?

A. You are right, Mr. Kelley, it was held in St. Paul.

Q. Do you know about when it was held?

A. I don't recall just when. My recollection is that it was I think late summer or early fall. I don't know which. [fol. 110] Q. Now, did the Steering Committee hold any meetings prior to, during, after this convention?

A. Yes.

Q. Do you recall whether there were any Steering Committee meetings held prior to the convention dealing with what was to be done at the convention?

A. Yes.

Q. Was such a meeting held?

A. Well, there were meetings, Mr. Kelley.

Q. Several meetings?

A. Yes.

Q. Well, do you recall a particular meeting which was held in the City of Chicago?

A. Yes.

The Court: I think it would be better if you let the witness testify where they were held and when rather than—

Mr. Kelley: Well, your Honor, as he stated, there were many, many meetings, and I am merely trying to save a little time. I can do it the other way if that is your wish.

The Court: I think it would be better if you asked him where the meetings were held and then enumerate them, and then, if you have one you wish to mention, you can ask about that meeting.

Mr. Witt: We object to Mr. Kelley's statement that the witness testified that there were many, many meetings. The witness hasn't so testified.

The Court: I didn't think he so testified either.

Mr. Kelley: He said there were several. I apologize to the Court and to Mr. Witt. Now, it seems to me, your Honor, in order to carry this thing along when there have been more than one meetings—

The Court: He said several meetings. You asked him the question. I do not know whether it is quibbling or not. You made the question very broad—before, after or during. He said there were several meetings. You started to ask about one meeting, and he said there were several meetings.

Mr. Kelley: That's right. I want to direct his attention to a particular meeting.

The Court: You can simply ask him where the meetings were held and then, if there is one of them you want to refer to, you can specify the meeting.

[fol. 111] Q. Do you recall where the meetings were held, Mr. Eckert?

A. Yes.

Q. Will you state where those meetings were held?

A. One or more was held in Chicago, and one was held in St. Paul immediately prior to the convention and subsequent Steering Committee meetings during the convention.

Q. Do you recall whether there was more than one meeting held in Chicago relating to the matters to be taken up at the St. Paul convention?

A. Yes.

Q. And where were the different meetings held there?

Mr. Witt: Well, the witness has said there was more than one, and now Mr. Kelley has referred to different meetings. We can't tell whether he is talking about two or 700 meetings. Why doesn't Mr. Kelley ask him how many?

The Court: You can get to the same question if you ask him where they were held and enumerating the places probably would suffice. The witness said I think there were one or more meetings held in Chicago, and you can ask him how many meetings were held in Chicago and then get to the one you want to ask him about.

Q. How many meetings were held in Chicago, Mr. Eckert, if you recall, at that particular time?

A. I recall two meetings of the Steering Committee to deal with this matter of the convention.

Q. Do you recall where those meetings were held?

A. One meeting was held at the home of the Editor or Associate Editor of the paper, Henry Horowitz.

Q. And this was at his home in Chicago, is that right?

A. Yes.

Q. I think this is the first time you have mentioned the name of Henry Horowitz, is it not? Will you state if you know whether or not Henry Horowitz was a member of the Communist Party?

A. Yes, he was.

Q. And I believe you stated he was the Associate Editor of the Union paper?

A. Yes.

Q. Now, about how many people, if you recall, were present at this meeting?

Mr. Witt: I am sorry, your Honor, Mr. Kelley has now asked the witness where one meeting was held and he said at the home of Horowitz. He has not asked him where the other meeting was held.

[fol. 112] The Court: He may not be wanted (sic) to refer to the other meeting. He is simply asking him about the meeting at Mr. Horowitz' home I think.

Mr. Witt: I won't press it, but I think it would clarify the record if Mr. Kelley would ask him where the other meeting was held.

Mr. Kelley: I would like to try this case in my own way and to the Court's satisfaction.

The Court: I think you may proceed. That can be gone into on cross examination. You are not bound to go into that now.

Q. I asked you how many people were at this meeting at Henry Horowitz' home. A. As near as I can recall a dozen or more.

Q. Now, what kind of a meeting was this?

Mr. Deikman: Objection, your Honor.

The Court: I will sustain the objection, because I do not know what you mean by "type", and I do not know whether the witness would have in mind the same thing. The test is what happened.

Q. Now, will you name those whom you can remember who were present at that meeting?

A. The members of the Steering Committee, Maurice Travis, Al Skinner, myself, Harold Sanderson, Chase Powers, Clinton Jencks, William Gately, Mr. Dolan, Graham Dolan I believe his name is, Irving Dichter, Herman Clott, Gil Green, Fred Fine. These are names of some of the people that occur to me who were there.

Q. I think this is the first time that you mentioned the name of Fred Fine. Will you tell us who Fred Fine was?

A. He was the Trade Union Secretary of the Communist Party of Illinois.

Mr. Witt: The witness has so testified earlier.

Mr. Kelley: I had forgotten. I am sorry.

Mr. Witt: As long as I am on my feet, your Honor, may we have the time of this meeting fixed if the witness can [fol. 113] a little more exactly? It is kind of vague.

The Court: I think you should fix the time more definitely, Mr. Kelley. It hasn't been fixed at all except it was before the convention sometime.

Q. I think you said at the time of the convention in the late summer or early fall of '46, and that was prior to that time.

The Court: Whether it was a week or two weeks or a month before hasn't been mentioned.

Mr. Witt: Mr. Kelley just misspoke. We are talking about '47. Mr. Kelley just said '46. Just so the record won't be confused.

Mr. Kelley: All right.

Q. You might—

The Court: You might ask him about when it was.

Q. When or how long prior to the St. Paul convention did this meeting occur?

A. Well, it was just prior to the convention, I believe not more than a few days before the convention opened.

Q. Now, you have mentioned some other names I think for the first time—Mr. Clott and Mr. Jencks and possibly one or two others. I would like to ask you this question: Was there anyone present at that meeting who was not a member of the Communist Party?

A. No.

Q. At this meeting did anyone preside? Was it a formal or informal meeting?

A. Well, it was a business meeting. It was not formal in the sense that parliamentary rules did not apply or anything like that, but it was a business meeting. In that sense I believe it would be formal.

Q. Did Mr. Travis make any statement at that meeting?

A. Yes.

Q. And will you give the substance of what Mr. Travis said at that time?

A. The substance of Mr. Travis's statement, at least one of the matters that I can recall was that he was in agreement with the proposals that have been made by Gil Green that he not run for reelection as President of the Mine, [fol. 114] Mill & Smelter Workers and that he was in agreement with the supporting of the candidacy of Jack Clark, that he favored the candidacy of Reed Robinson for Eastern Vice President, and stated later in the meeting that because we could not resolve the question of whether to support Homer Wilson for Eastern Vice President that the decision should be made by this Party meeting to support Jack Clark for President and he, Travis, would run for Secretary-Treasurer of the Union, and that the matter of whether the Party should support Homer Wilson for Eastern Vice President or Reed Robinson would be settled at the Steering Committee meeting in St. Paul prior to the convention.

Q. Now, Mr. Eckert, do you recall any statement having been made by Gil Green at that meeting?

A. Yes.

Q. And will you state what he said?

A. The substance of the statement made—statements made by Gil Green, first of all, in relation to whom the Communist Party should support for President of the Mine, Mill & Smelter Workers, that it was his belief and that of the Communist Party that the CIO's opposition to the Communists in Mine-Mill, specifically to Maurice Travis as President, that he felt that Travis should not run for President of the Union. He stated that he believed the candidacy of a person like Jack Clark, who although not a Communist could be expected not to oppose the Communists inside the Union, that, therefore, the Party should support Clark for President, and he stated that he would also go along with the Party supporting Travis for Secretary-Treasurer of the Union and discussed further the candidacy for Western Vice President, Wesley Madill, and I don't recall whether he took the position of Madill at that time or not.

Q. Now, do you recall whether or not any action was

taken by that group or the Steering Committee at that meeting?

A. Yes.

Q. And what action was taken?

A. The action taken was, first of all, for the Party to support Jack Clark for President of Mine-Mill.

Mr. Deikman: Objection, your Honor. It seems to me that what action such a group took is really the opinion of this witness. It has no relation to the defendant, it is not the action that the defendant took. I do not see how a person can give an opinion as to what a group did.

Mr. Kelley: It is not an opinion that he is testifying to. [fol. 115] The Court: I think I will overrule the objection. He can answer the question.

A. I am afraid I will have to have the question read back.

Mr. Kelley: He was in the middle of his answer at that time.

The Court: The reporter can read the question and so much of the answer as he gave.

(The reporter read the last question and answer.)

A. And Maurice Travis for Secretary-Treasurer, that the matter of whom to support for Eastern Vice President whether it be Reed Robinson or Homer Wilson would be left to a later decision to be made by the Steering Committee in St. Paul.

Q. Now, I believe you stated that there were two meetings of the Steering Committee in Chicago prior to the 1947 convention in St. Paul. Do you recall when in reference to the time of the Horowitz meeting the other meeting occurred?

A. There had been another meeting prior to the meeting in the Horowitz house in the Communist Party office in Chicago where these matters had been discussed and decision made there to call what we called at this time an enlarged—

Mr. Deikman: Objection, your Honor.

The Court: I will sustain the objection.

Mr. Kelley: To what?

The Court: You haven't established that Mr. Travis was at this other meeting or anything else, the Jury will disregard that answer.

Mr. Kelley: It is true that we got into what happened without complete foundation.

Q. At this meeting in the Communist Party Headquarters will you state who was present there?

A. Maurice Travis, Gil Green, Fred Fine, Al Skinner, myself, Harold Sanderson. I don't recall whether the other member of the Steering Committee, Chase Powers, attended [fol. 116] that meeting or not.

Q. Did Mr. Travis participate in this meeting?

A. Yes.

Q. And now, will you state what occurred there at that meeting?

A. A discussion was held by those of us attending and statement made by Mr. Green pertaining to the coming convention and the selection of officers and their having stated a position similar to the one I previously described he felt that Travis should not run for President of the Union, that Jack Clark should be supported for President, and to call what we referred to as an enlarged meeting of the Steering Committee.

Q. And that is the meeting that you just previously testified to at Horowitz' house?

A. Yes.

*****

Mr. Kelley: We go now to St. Paul. It is a good breaking point as far as I am concerned.

Mr. Witt: I have one problem before we recess so we won't have to worry about it when we come back. I may have missed it, but I do not think the witness fixed the time of this meeting in the Communist Party Headquarters before the Horowitz meeting.

The Court: I think he said, but he didn't say when, how long before. You had better ask him that before we leave.

Q. All right, Mr. Eckert, how long before the Horowitz meeting was the meeting in the Communist Party Headquarters?

A. My recollection is that it was not long, insofar as I can recall, not over several weeks before the Horowitz meeting.

Q. You are not able to fix the exact date?

The Court: Can he fix a more definite date like one week, two weeks, three weeks?

Q. Could you say it was one week or two weeks or three weeks or just approximately?

A. I really don't know.

Q. This was in 1947, is that right?

A. Yes.

Q. And you stated that the meeting at Horowitz' house was just a few days, as I recall, prior to the convention?

A. Yes.

Q. Now, can you say within a week or two or three how long before the Horowitz meeting the event occurred?

[fol. 117] A. I don't think I could accurately say any closer than I did before.

Q. But it related to what was to be done at the Horowitz meeting, is that correct?

A. Right.

The Court: I think that maybe he mentioned it already. We will have a recess for 15 minutes.

The Court: You may proceed.

By Mr. Kelley:

Q. May it please the Court, ladies and gentlemen of the jury. Mr. Eckert, did you attend the convention of the International Union of Mine-Mill in St. Paul in 1947?

A. Yes.

Q. And do you know whether or not the defendant was present during that convention?

A. Yes, he was.

Q. And at that time what was the position of Mr. Travis in the union prior to the convention?

A. President.

Q. Now, I believe you testified that there were some meetings of the Steering Committee during this convention, is that correct?

A. Yes.

Q. Do you know about how many may have been held?

A. There was at least one official meeting of the Steering Committee. We had meetings of, well, sort of partial; some members of the committee would be there, some wouldn't during the convention to discuss various matters.

Mr. Witt: We move to strike everything the witness included in that answer after he said there was at least one meeting. If I understood the rest of his answer he is now trying to say that when he would have a conversation with a member of the Steering Committee then that made it a partial meeting of the Steering Committee, or something of that character, and we can't deal with vague and uncertain testimony of that kind.

The Court: I think I will overrule the objection, because he stated on an informal basis. He mentioned one meeting and then he said there were other meetings of smaller group (sic). Before we go into any of those we can consider the objection relating to any of them, so you may proceed, Mr. Kelley, and the objection will be overruled.

Q. Now, this one meeting that you referred to as a true—[fol. 118] I would characterize your statement as being a true Steering Committee meeting—where was that held?

A. In a hotel room in St. Paul.

Q. And who was present at that time?

A. Present were Maurice Travis, Chase Powers, Al Skinner, myself, Harold Sanderson, and the national representative of the Communist Party. His name I cannot recall.

Q. Now, do you recall what the subject matter—well, was there anything discussed at that meeting?

A. Yes.

Q. And what was the subject matter of what was discussed?

Mr. Deikman: Objection, Your Honor; I think it is improper to ask his opinion as to what the subject matter was. He should only testify as to what he heard and saw at that meeting.

The Court: I think that is technically correct. He can say what was said at the meeting. His conclusion about

what the subject matter was might differ from that of someone else there and the jury is the ultimate judge of what transpired, and it must be from the statement of those present.

Q. All right, Mr. Eckert, I will ask you whether or not Mr. Travis made any statements at that meeting?

A. Yes.

Q. I believe you mentioned Mr. Skinner was there. Did he make any statements at that meeting?

A. Yes.

Q. And I believe you said Mr. Powers was there?

A. Yes.

Q. Did he make any statements?

The Court: Why don't you ask him who made statements and who said what?

Q. Now, Mr. Eckert, will you relate the substance of what the several members of the Steering Committee said at that meeting?

Mr. Deikman: Objection, Your Honor. The question calls for a sort of a compendium of what everyone said at a meeting.

The Court: I think Mr. Kelley means, and what the witness should testify to, he should attribute the statement to whoever made it, not any concensus of the statements, but Mr. so and so said this, that, or the other thing, and Mr. so and so said what he testifies to; so you may proceed [fol. 119] on that basis. You can identify the speaker; that's all it amounts to, and say what he said.

A. Mr. Travis stated that he felt that Reid Robinson should be supported for eastern vice-president and oppose Homer Wilson. Mr. Skinner stated in substance the same viewpoint. I stated a different viewpoint, that I thought that Mr. Wilson should be supported, and later I stated that after receiving the instructions from the national representative of the party there, I agreed to go along and support the decision of the Steering Committee to support Reid Robinson for eastern vice-president instead of Homer Wilson.

Q. If you covered this I missed it. Did you state the

position or (sic) whether or not Mr. Powers took a position on this matter?

A. I don't recall whether he did or not.

Q. I will ask you whether or not you are familiar with the term "progressive caucus"?

A. Yes.

Q. And what is a progressive caucus as it is known in the Mine-Mill union, or was known at that time, and in the Communist Party?

Mr. Deikman: Objection. There is no foundation for an opinion by the witness as to what a progressive caucus is.

The Court: What is the purpose, Mr. Kelley?

Mr. Kelley: I am merely trying to enlighten the jury, Your Honor, on the next meeting that I am going into.

The Court: Let's go into the meeting.

Mr. Kelley: We can get into the meeting and then describe it.

The Court: There is no foundation now for the question, so I will sustain the objection.

Q. Now, was there a progressive caucus meeting held during the St. Paul convention?

Mr. Deikman: Imminently leading in view of Your Honor's ruling.

The Court: Ask him if any meeting was held. It is [fol. 120] not for you to denominate or the witness even what the meeting was. The jury are the ones that are interested in determining that from the evidence.

Mr. Kelley: That's right, Your Honor; this is merely a foundation question.

The Court: Ask him if he was at any other meetings?

Q. Did you attend any other meetings during this convention?

A. Yes.

Q. And will you name the meetings that you attended?

A. I attended the meeting of the progressive caucus.

Q. And any others?

A. Well, I attended a number of convention committee meetings and the meetings of the Diecasting Division of the union that I headed.

The Court: We are only concerned with meetings at which Mr. Travis was present, and I think your question ought to embrace that. You may have been to a dozen meetings, but it would have no significance here.

Q. You mentioned having attended a progressive caucus meeting, and I will ask you whether or not Mr. Travis attended that meeting?

A. Yes, he did.

Q. And who presided at that meeting, if you recall?

A. I don't recall who presided at the meeting.

Q. And about how large a meeting was it?

A. My recollection is that the meeting contained fifty, sixty people, more or less. That's about as close as I can recall.

Q. And will you name those that you recall being present at that meeting?

A. The people present were members of the Steering Committee, Maurice Travis, Chase Powers, Al Skinner and I, Harold Sanderson, Maurice Wright, Irving Dichter, Mr. Jencks, Peter Zvara, Ernest Love. These are some of the people I recall having been there; Homer Wilson, also.

Q. And you estimated about fifty or more. Now, do you know what the fact is in regard to whether or not the remainder of those who were there were members of the Communist Party or not?

Mr. Deikman: Objection, Your Honor. He hasn't stated anything about any political affiliation of anyone at the [fol. 121] meeting. The "remainder" is meaningless, and further how could the witness possibly know the affiliation of sixty-odd people?

The Court: He is simply asking if he knows. The objection will be overruled. You can answer the question.

A. Yes.

Q. Now, does that apply to those you didn't name as well as to those you did name?

The Court: I don't know what the witness' answer was. Read the question and answer.

(The last previous question and answer were read by the reporter.)

The Court: That's what I thought. He only said he knew.

Mr. Kelley: That was my error; I apologize to the Court.

Q. Now, what is the—

Mr. Witt: If the Court please, that may still be a little ambiguous. The "remainder," does that refer to those who were there whom he didn't name specifically, is that the way Your Honor understands it?

The Court: That's the way I understood it.

Mr. Kelley: I might clear that up, Your Honor. Let me preface it this way, that I have previously asked him about a number of those named as to their affiliation or membership with the Communist Party, and this time I was covering the balance of those, what kind of a meeting it was, and who was there, that was what I was trying to get at.

Q. You state that you know the type of people that were there, is that correct?

A. In a general way I do; some I do, some I do not.

Q. Well, in a general way will you state—

The Court: I think his answer disqualifies him. He says, "In a general way he does and he does not." The thing has [fol. 122] to be specific; if he knows he knows, if he doesn't know he doesn't know, so I think you better proceed to something else.

Mr. Kelley: All right, Your Honor.

Q. Now, did Mr. Travis speak at this progressive caucus meeting?

A. Yes.

Q. And will you state the substance of his remarks at that time?

A. The substance of his remarks were that he was not running for president, he was running for secretary-treasurer, that he felt that the progressive caucus should not support Homer Wilson for eastern vice-president, that the progressive caucus should support Reid Robinson for eastern vice-president, Wesley Medill for western vice-

president, George Clark for president. This was the substance of the remarks as I recall them.

Q. And at that meeting did you make any statement in connection with this same matter?

A. Yes.

Q. And was Mr. Travis present at that time?

A. Yes.

Q. And will you state the substance of your remarks at that time?

A. The substance of my remarks were the same as Mr. Travis'.

Q. Now, do you know what the fact is as to whether or not in the election that followed whether or not the candidates supported by the Steering Committee were elected by the membership of the union?

Mr. Witt: If the Court please, before the witness answers that question, I don't think Mr. Kelley asked the witness to fix the place where this meeting of the progressive caucus was held. I think he did say St. Paul, but we think we should know where in St. Paul.

Mr. Kelley: I think you are right, Mr. Witt.

Q. Where was the progressive caucus held?

A. It was held in a hall near where the convention was held. I don't recall the street or the name of the place.

Mr. Deikman: Your Honor, I object to the question itself. It calls for a conclusion as to what the results of an election were.

[fol. 123] The Court: We are talking about two questions. He didn't answer the other question, and Mr. Witt raised the question that the place hadn't been identified, and I think Mr. Kelley just asked where this meeting was held. That's the present pending question.

Mr. Kelley: I think it is, Your Honor.

Mr. Deikman: Excuse me.

Mr. Kelley: And he has answered that now. He stated it was in a hall.

The Court: Did you fix the time of the meeting?

Mr. Kelley: During the convention is as close as we have fixed it.

The Court: Do you wish to inquire whether he can fix it any nearer than that?

Q. Do you remember how many days this convention lasted?

A. Well, it was about four or five days, as close as I can recall.

Q. And do you recall whether the progressive caucus was held early in the convention or along in the middle or at the end, or can you place it any better than just during that period?

A. Well, my recollection is it was held during that convention prior to the nominations of these officers from the convention floor. About as close as I can put it, Mr. Kelley, it was held during the evening during the days the convention was meeting. I don't recall it any closer than that.

Q. Now, I don't know whether you answered the question that I asked you if you knew of your own knowledge whether or not the candidates supported by the Steering Committee or sponsored by the Steering Committee were elected by the members of the union?

Mr. Deikman: Objection, Your Honor.

The Court: I think I will sustain the objection. I haven't heard any testimony that the Steering Committee sponsored them or anything to that effect. I have heard it said who Mr. Travis and some of the gentlemen who spoke were.

[fol. 124] Q. Well, let me ask you this: was any decision made or report made by the members of the Steering Committee in reference to candidates at that convention?

A. Yes.

Q. And what was that report or decision?

Mr. Deikman: Objection, Your Honor.

The Court: Who was the report made to?

Q. To whom was the report made?

A. The report of the Steering Committee?

Q. Yes. I will withdraw that question.

May it please the Court, at this Steering Committee at the hotel Mr. Eckert has testified at least three members of the four members on the Steering Committee all spoke in

favor of certain candidates and they appeared on the floor of the caucus and supported those candidates. It seems to me that the question I asked is encompassed in that background. Now, I can change the form of the question and ask this:

Q. Do you know whether or not the candidates which the individual members of the Steering Committee—.

The Court: Why don't you ask him simply who was elected to these respective offices at the convention, and the jury can decide?

Mr. Deikman: Well, Your Honor, I don't see the possible relevancy of that information.

The Court: It may not be the best evidence. If he wants to ask him that, who was elected president at the convention and who was elected secretary-treasurer, and who was elected eastern president.

Mr. Kelley: Well, Your Honor, I was trying again to save time and not go into the process by which they are elected. They are elected by a referendum rather than at the convention.

Mr. Witt: I object to Mr. Kelley's testifying.

The Court: I think I better let you proceed and withdraw my own suggestions, and I will rule on the questions you ask, and so ask the question.

[fol. 125] Q. Mr. Eckert, do you know of your own knowledge whether or not the officers or the candidates for office in the Mine-Mill union who were supported by the Steering Committee at the progressive caucus were elected by the membership of the union?

Mr. Witt: Object to that.

The Court: I will sustain the objection to the form of the question. I haven't heard any connection between this progressive caucus and the Steering Committee; I don't know the connection. I have heard about these meetings in Chicago and this meeting in St. Paul of the Steering Committee, but not this subject you are talking about now.

Mr. Kelley: Your Honor, the answer to this question provides the connection.

The Court: But, it is on a premise that isn't in evidence. There is no foundation for the question.

Q. Well, were candidates elected by the membership of the Mine-Mill Union following the St. Paul convention?

Mr. Witt: I object to that as being irrelevant, your Honor.

The Court: If he knows, I think he can answer that.

A. Yes.

Q. Now, were the candidates who were supported by the members of the Steering Committee at that convention elected by the membership of the Mine-Mill Union?

Mr. Witt: I object to that. There is no foundation for that.

The Court: That is on the basis that no premise has been laid. I don't know about this Steering Committee, what they recommended at all. If it is in the record, I overlooked it.

Mr. Kelley: I said the individual members.

The Court: There is no evidence about that. He expressed what he thought. I heard what Mr. Travis thought [fol. 126] and one other member, but I haven't heard what the rest of them thought.

Mr. Kelley: All right. We will pass it. It is not of great moment.

Q. Now, Mr. Eckert, directing your attention to the year 1948 I will ask you whether or not you attended any meeting in New York City with the defendant Maurice Travis.

A. Yes.

Q. Did you attend more than one meeting during that period with him?

A. Yes.

Q. Will you name, can you tell about how many meetings during, say, the early part of 1948 that you attended with Maurice Travis?

Mr. Witt: In New York City is the question?

Mr. Kelley: Yes.

A. Well, I recall a couple of them.

Q. Will you state where the two that you recall were held?

A. Well, one was held in a hall of a, what was known as a trade union building or center in downtown Manhattan in New York City. The street I don't recall.

Q. Now, was Mr. Travis with you when you attended this meeting?

A. Yes.

The Court: When was this?

Mr. Kelley: That is the next question, your Honor.

The Court: All right.

Q. About when, if you can state, Mr. Eckert, did this meeting occur?

A. Well, it occurred the early months of 1948, I believe February as near as I can recall.

Q. Now, who were present at this meeting?

A. Present in addition to Maurice Travis and myself were John Williamson, Eugene Dennis, William Z. Foster, Arnold Johnson, Al Lannon, Hugh Bryson, James Matles, Julius Emspak, a couple of people representing the Furniture Workers Union, I don't recall their name, another person representing the or a couple of people representing the Farm Equipment Union whose names I don't recall, a person representing the Furniture Workers Union, I don't [fol. 127] recall his name, Ben Gold. These were some of the people I recall having attended that meeting.

Q. Do you recall whether or not there was a representative of the National Maritime Union there?

A. I mentioned Al Lannon who was in that capacity. Gil Green was also there.

Q. How did you happen to go to this meeting?

A. I was notified by Maurice Travis that there would be a meeting in New York City which I should attend.

Q. And as a result of that notification did you meet Mr. Travis in New York City?

A. I did.

Q. And you were both in attendance at this meeting?

A. Yes.

Q. Were both of you there during the entire time of the meeting?

A. Yes.

Q. About what time of day did it start and terminate?

A. It started around 8:00 o'clock in the evening and lasted very late. By "very late" I mean midnight or somewhat later.

Q. Now, I believe you told us who John Williamson was. You mentioned the name Eugene Dennis. Who is Eugene Dennis at that time I mean?

A. He was General Secretary of the Communist Party of the United States.

Q. And who was William Z. Foster?

A. He was National Chairman of the Communist Party of the United States.

Q. And you mentioned a man by the name of Arnold Johnson. Who was he?

A. He was Ohio State Secretary of the Communist Party.

Q. I guess you have told us about Gil Green. Now, you mentioned the name Ben Gold. Who was Ben Gold?

A. Ben Gold was a member of the Central Committee of the Communist Party and an official of the Fur Workers Union.

Q. And Julius Emspak?

A. He was an official of the United Electrical, Radio, and Machine Workers Union.

Q. And a Mr. Matles?

A. He was also an official of the same union.

Q. Now, I didn't ask you about Mr. Emspak or Mr. Matles. What is the fact, if you know, as to whether or not those two men were members of the Communist Party?

A. Yes, they were.

Q. You mentioned a man by the name of Bryson I believe?

A. Yes.

Q. And do you know whether or not he held a Union position?

A. I am not positive whether he held one at that particular time or not.

Q. Do you know whether or not Bryson was a member of the Communist Party at that time?

A. Yes, he was.

[fol. 128] Q. Now, you mentioned that there were representatives of the Farm Equipment Workers Union and the

Furniture Workers Union there. Do you know whether or not they were members of the Communist Party?

Mr. Witt: I object to that.

The Court: I will sustain the objection.

Q. Mr. Eckert, do you know of your own knowledge whether or not this was a closed Communist meeting?

Mr. Deikman: Objection.

The Court: I will sustain the objection. It calls for a conclusion.

Mr. Kelley: It is within his knowledge, your Honor.

The Court: It is a conclusion on his part. He can testify specifically with respect to these. He has named a few people he recalled but not—there were others there beyond that.

Q. Who presided at this meeting, Mr. Eckert?

A. My recollection is that John Williamson presided.

Q. Now, will you, did Mr. Williamson make any statement in opening this meeting?

A. Yes, he did.

Q. And will you give the substance of the remarks made by Mr. Williamson at that time?

A. Mr. Williamson stated in substance that this meeting of Communists who held positions in the labor unions was called to decide on the matter of whether or not the Communists should advocate the signing of the non-Communist affidavits, that he, Williamson, and his associates were tired of having his door broken down on the ninth floor of the Communist Party Headquarters by Communist officials in unions who were clamoring for permission from the Communist Party to sign the non-Communist affidavits, that he and his associates on the top committee of the Communist Party had given authority for the Farm Equipment Workers to sign the non-Communist affidavits, but that this meeting was for the purpose of reconsidering that and to make a decision whether the previous authorization to the Farm Equipment Workers should be rescinded and also to make a decision as to what should be done on this question in the other unions represented by the Communist officials present.

[fol. 129] Mr. Witt: If the Court please, if I caught the beginning of the witness's answer, he said that John Williamson said that this meeting of Communists had been called. Now, the witness was on that witness chair a few minutes ago when your Honor sustained the objection to Mr. Kelley's question as to whether or not this was a closed Communist Party meeting, and it is my impression that the witness deliberately in his answer had Williamson say that this meeting, referred to this as a meeting of Communists. No person in the world could possibly remember the exact words at that time.

The Court: That goes to the question of the weight to be given the witness's testimony. He has testified that is what Mr. Williamson said, and, so, it will stand. Proceed, Mr. Kelley.

Q. Now, at this meeting, Mr. Eckert, did Ben Gold make any statement?

A. Yes.

Q. Do you recall the substance of what he said?

A. Yes.

Q. And will you state that, please?

A. The substance of Mr. Gold's remarks were that he felt it was an error for the Farm Equipment Workers to proceed with the signing of the non-Communist affidavits, that he felt it was an error in policy for any of these unions to do that, and that this particular union, the Fur Workers Union, was not experiencing the difficulties of these other unions but that, if at any time in the future his union would experience similar difficulties, the question, he would then reconsider the question but that he urged the people there to make a decision not to sign the non-Communist affidavits.

Q. Now, did the General Secretary, Eugene Dennis make any statement at that meeting?

A. Yes, he did.

Q. Do you recall what he said?

A. My recollection of the substance of Mr. Dennis's remarks were that he too felt it was a mistake to have given authorization to the Farm Equipment Workers to sign the non-Communist affidavits and that it should be changed and that no other union that the Communists exercised influence in or control should sign the affidavit.

Q. Now, do you recall whether or not William Z. Foster spoke at that meeting?

A. Yes, he did.

Q. And do you recall the substance of the remarks that he made at that time?

A. The substance of William Z. Foster's remarks were in substance the same as Mr. Dennis's.

Q. Now, did anyone else speak at that meeting in reference to the signing of the affidavits?

A. Yes.

[fol. 130] Q. And do you recall who it was?

A. Well, both of the representatives of the Farm Equipment Workers spoke.

Q. Do you recall their names at this time?

A. One of them was Grant Oakes. I don't recall the other's name.

Q. And do you remember the substance of the remarks of Mr. Oakes?

A. Yes.

Q. And will you state, please?

A. The substance was that his union, the Farm Equipment Workers, were experiencing considerable difficulty in Labor Board elections where they could not appear on the ballot because the law prevented the name of their union from appearing on the ballot because of their not having signed the non-Communist affidavits, and that, unless this policy was changed, they would have continuing difficulty of retaining those local unions in the Farm Equipment Union.

Q. Now, did others speak at that time?

A. Yes, there were others.

Q. Now, was there any decision made at that meeting?

A. Yes.

Q. What was the decision?

A. The decision was not to sign the non-Communist affidavits and that the Farm Equipment Workers should not proceed with the machinery they had set in motion to call a convention and sign the affidavits.

Q. Now, following the meeting did you see Mr. Travis?

A. Yes.

Q. Where did you see him?

A. We rode back to the hotel in a taxicab together.

Q. Now, during that time did you have any conversation with Mr. Travis in reference to what had transpired at this meeting?

A. Yes.

Q. Did he make any statement at that time?

A. Yes, he did.

Q. Do you recall the substance of his statement?

A. Well, the substance of his statement was that the decision had been made and that we would just have to live with it and not sign the affidavits.

Q. Now, Mr. Eckert, I would like to ask you whether or not following this meeting you attended a meeting at the home of Mr. Travis.

A. Yes, I did.

Q. And where did Mr. Travis live at that time?

A. In Chicago.

Q. And how long after the New York meeting if you recall was this meeting in Travis's home?

A. It was shortly after, I don't recall exactly, as near as I can recall a week, possibly two weeks.

Q. Now, who was present at this meeting?

A. Well, present were Maurice Travis, Gil Green, Al Skinner, Harold Sanderson, and I. I don't recall whether [fol. 131] Chase Powers was present. The general counsel of Mine-Mill was present.

Q. Now, was this in the nature of a formal or an informal meeting?

A. Well, if—

Mr. Deikman: Your Honor, I object to that. This word has no meaning that is probative in this Court: It calls for many varieties of ideas of what is a formal meeting and what is an informal meeting. I think the witness should just testify, and the jury can draw its own conclusion as to what kind of a meeting it was.

The Court: I think that is probably right. Without a definition of formal or informal you can ask what happened.

Q. Did anyone preside at the meeting at Mr. Travis's home?

A. Well, someone presided over the business part of the meeting. I don't recall just who did. It was not an official type of meeting. I don't recall if anybody could be designated as officially presiding.

Q. Now, were there discussions held at this meeting?

A. Yes.

Q. And did Mr. Travis participate in the discussions that occurred there?

A. Yes.

Q. Do you recall any statements or the substance of statements made by Mr. Travis at that meeting?

A. Yes.

Q. And will you state the substance of his remarks?

A. The substance of Mr. Travis's remarks was that we would have to go along in Mine-Mill and support the decision that had been made not to sign the non-Communist affidavits and that my division of the union, the Die Casting Division which was experiencing, was experiencing difficulties, that the Farm Equipment Workers were not being able to be on the ballot, that we would just have to do what these other unions were doing and carry out the decision by not signing.

Q. Do you recall any remarks by Mr. Skinner at that meeting?

A. Yes.

Q. And will you state the substance of those?

A. The substance of Mr. Skinner's remarks were about the same as Mr. Travis'. He added further that in the Diecasting Division of the union which I was heading, which he also was from that section of the union in Chicago, and stated that he was confident that the Diecasting Division would be able to beat off these raiding attacks by other [fol. 132] unions and that we should support the decision not to sign the affidavits.

Q. Now, do you recall any other discussion that occurred during that time at Mr. Travis' house between Mr. Travis and any of the other persons there?

A. Yes.

Q. And with whom did he discuss any particular subjects?

A. Well, he discussed this question with Gil Green who was there.

Q. Now, will you state the substance of the discussion between Mr. Green and Mr. Travis and state who said what in relating the substance of it to the Court and jury?

A. Mr. Green stated in substance that the Communist-led unions should not sign the non-Communist affidavit, and that the Communists should organize themselves inside to attempt to win these labor board elections by asking the people involved to mark the ballot, "No." It was stated in substance that it was extremely important for the Communists to maintain their position inside the labor unions and continue to work in them.

Mr. Travis directed an inquiry to Mr. Green, the substance of which was whether the teachings of V. Lenin as specifically contained in a booklet called, "Left-Wing Communism," stressing the necessity of Communists working inside trade unions, remaining in them at all costs, to use every artifice or device in order to remain in the labor movement, whether that policy wasn't applicable in the present situation, and Mr. Green relied in substance that it was.

Q. Now, do you recall any other conversation between Mr. Travis and Mr. Green at that time?

A. I don't recall other than the substance of the matter I have already stated here.

Q. I will ask you if you recall any discussion in reference to the Farm Equipment Worker's Situation?

Mr. Deikman: Objection; the witness has stated that that is all he recalls in the discussion, and since the witness no longer has anything further to say about the discussion now Mr. Kelley is testifying and attempting to tell the witness what to say. The question is leading.

The Court: I will overrule the objection. If the witness can recall, why, he can testify; if he can't, why, you better drop the subject. Do you recall anything?

The Witness: Yes.

[fol. 133] The Court: Go ahead then and answer it.

Q. Will you state the substance of that part of the conversation?

A. Mr. Travis inquired as to what procedure or method could have been used by the Farm Equipment Workers in

signing these non-Communist affidavits in view of the requirement of the law to swear that one is not a member of the Communist Party.

Mr. Green stated in substance that the law did not require one to swear that he had not been a member prior to signing or after signing, and also that Communists could belong to a Thursday afternoon social club or some other type of organization which wouldn't necessarily be the Communist Party, that the oath required would only refer to the Communist Party. That is the substance of the conversation.

Q. Now, Mr. Eckert, directing your attention to the spring of 1948, I will ask you where you were living at that time?

A. I was living at Avon Lake, Ohio.

Q. That's in the Cleveland area?

A. Yes.

Q. And was your position with the union the same at this time as you have previously testified?

A. At that time, yes.

Q. Now, did the Diecaster's Division of Mine-Mill have a meeting in Cleveland during the spring of 1948?

A. Yes.

Q. And do you remember what month it was?

A. Yes, April.

Q. Do you know what the purpose of the meeting was for?

A. Yes.

Q. And what was that?

A. To have the Diecasting Division of the Union—

Mr. Deikman: Objection, Your Honor. The question was what was the purpose of the meeting. Again this calls for a conclusion on the part of the witness.

Mr. Kelley: He was the head of the Diecasting Division.

The Court: If he knows; what is the source of his knowledge? Was there a call, or what happened to call the meeting?

Q. Did you call the meeting?

A. Yes, I did.

Q. And what was the purpose for which you called the meeting and did you so notify the members or delegates [fol. 134] in your call of the meeting?

A. At the—
Q. I think just a yes or no on that.
A. Yes.
Q. And what was the stated purpose of the meeting?

Mr. Deikman: What the stated purpose of the meeting was has no relation to the defendant unless he somehow connects it up.

The Court: This is preliminary, I expect. He can answer the question. I assume the Government will connect this in some way.

Mr. Kelley: It is preliminary, Your Honor.

The Court: All right; the objection will be overruled.

A. The stated purpose of the meeting as set out in the call of the meeting, as I recall, was to discuss the situation existing among the members of the Diecasting Division of the union who were on strike with the Precision Diecasting Company.

Q. Now, following the meeting of the Diecaster's Division, did you have a meeting at which Mr. Travis was present?

A. Yes.

Q. And about how long after the meeting of the Diecaster's Division?

Mr. Deikman: Just a moment. Apparently now Mr. Kelley has left the subject of the Diecaster's meeting. Unless he returns to it, which there seems to be no indication that he will, it is evidence that that whole meeting at which Mr. Travis was not present, at least there is no indication that he was, is irrelevant, and I move that that series of questions and answers be stricken.

The Court: I assume that the Government will connect up the meeting with something that you are about to have, is that right, Mr. Kelley?

Mr. Kelley: That's right, Your Honor.

The Court: You can renew the motion if they don't connect it up, but it will be overruled at this time.

Q. As I recall I was asking about how long after the Diecaster's Division meeting was this meeting at which Mr. Travis was present?

[fol. 135] A. My recollection is that it was within a few days, one, two or three days.

Q. And where was this meeting held?

A. In the Mine-Mill office in Cleveland.

Q. And who else besides yourself and Mr. Travis was present at this meeting?

A. Present was Irving Dichter, Pete Zvara, myself, Ralph Locke, Travis I believe I mentioned, Eric Hegstrom. There were some other staff members from the Diecasting Division of the union, and Paul Berdansky, and some—a few other people; I don't recall their names.

Q. Were there any other members of the Steering Committee present that you recall?

A. I don't recall whether Al Balint—or Al Skinner was there. Powers was not there.

Q. Powers was not there?

A. Not there.

Q. You have mentioned some new names, and unless counsel or the Court feel I should, I should like to ask you if those whom you have not previously identified as Communists, if the others in attendance at that meeting were members of the Communist Party at that time?

A. Not all of them.

The Court: That had all better be stricken, because it means nothing. The question and answer will be stricken.

Mr. Witt: I am sorry, we missed that.

The Court: I say, the question and answer were stricken because the answer was "some, but not all," which means nothing.

Q. Mr. Eckert, did anyone preside at this meeting?

A. Yes.

Q. And who was that?

A. Maurice Travis.

Q. And will you state whether or not Mr. Travis made any statement or remarks at that meeting?

A. Yes, he did.

Q. And will you tell the Court and jury the substance of his remarks?

A. The substance of his remarks was that the staff members of the Diecasting Division of Mine-Mill were present,

would no longer take instructions from myself as head of the Casting Division because of the resolution I had proposed to this Diecasting Division meeting urging a meeting with Phillip Murray, president of CIO, the signing of the non-Communist affidavits, and other matters; that my position in advocating such a resolution as that was contrary to the policy of the union and that the staff members there would in the future report to and take di- [fol. 136] rection from Irving Dichter, the regional director of the Diecasting Division of Mine-Mill in the New York, New Jersey area.

Q. Now, at that time was Irving Dichter a member of the Communist Party?

Mr. Witt: I object to that and move that the witness's last answer be stricken. There is absolutely no relevance to the issue in this case. The witness has already testified that this meeting was not a so-called Communist meeting, so, it was obvious the only other kind of a meeting it could have been is a meeting of union people, and what Travis said and what Travis did and what the witness said and what the witness did and whether Dichter was a Communist or not is absolutely immaterial.

Mr. Kelley: May I be heard on that, your Honor?

The Court: I think I will overrule the objection, but I haven't heard any connection yet between this meeting that Mr.—

Mr. Kelley: We will proceed to connect it.

The Court: —Mr. Deikman was objecting about.

Q. Now, were there any other meetings held by you and Mr. Travis in connection with your action and your proposals before the Die Casting Division meeting other than the one about which I have just inquired?

A. Yes, there were other meetings.

Q. And I will ask you whether or not there was—

The Court: Ask him where and when these were.

Q. When and where were these other meetings?

A. Well, another meeting was held following this meeting in Cleveland, in Chicago, Illinois, a meeting of the International Executive Board.

Q. No, Mr. Eckert. I am asking you if—was there a meeting at which you and Mr. Travis were present which related to the meeting that you just testified to in the Mine-Mill Headquarters?

Mr. Witt: I will object to that as entirely too leading.

[fol. 137] The Court: Well, the thing is extremely leading in the sense that you can ask the witness, he is the one that is testifying, not you, whether there were any other meetings and let him testify to what the fact is.

Mr. Kelley: When a person has attended a lot of meetings, unless you can direct his attention to a particular meeting, you can spend a lot of time.

The Court: Enumerate where the meetings were and where they were held, and, if you wish to direct his attention to a particular meeting, you may do so, to one of the meetings he has identified.

Q. Were there any other meetings other than you testified to in Cleveland about the time of this previous meeting that you just testified to?

A. Yes.

Q. And where was it or they held?

A. Well, the meeting in the Party office, or not the Party Office—the Mine-Mill office in Cleveland.

Q. Can you state when with reference to the meeting you have just testified to that this meeting took place?

A. My recollection is the same day just prior to or it might have been the night before.

Q. Now—

A. I don't recall exactly which.

Q. Excuse me. Who was present at that meeting?

A. There was Dichter, Travis, and myself.

Q. Do you recall whether there was anyone else present or not?

A. I don't recall anyone else being present if this could be called a meeting.

Q. Have you exhausted your recollection as to any meeting?

Mr. Witt: I will object.

The Court: I will sustain the objection. He has answered the question.

Mr. Kelley: It has always been my understanding of the rules of evidence that it is proper after a witness has exhausted his recollection to refresh his recollection.

The Court: Well, he has exhausted his recollection now he said. But you have to show surprise and several other matters before you can proceed on that basis.

[fol. 138] Q. Now, I believe you stated that this meeting occurred in the Mine-Mill offices, is that right?

The Court: You have an objection?

Mr. Witt: That question is somewhat ambiguous, just an objection as to form. What meeting is Mr. Kelley now referring to?

The Court: I assume he is talking about this meeting that the witness testified was just prior to, the night before the meeting that he has already testified in detail about. Is that right, Mr. Kelley?

Mr. Kelley: That's right, your Honor, at which Irving Dichter and the defendant and this witness were present.

Q. I will ask you one more question, Mr. Eckert. I appreciate you have had a long day.

The Court: I think we can proceed for a while longer unless the witness is ill or something.

The Witness: No, sir, your Honor, I am not.

Q. Now, do you recall whether or not Mr. Travis made any statement at this meeting?

A. A statement, I recall a statement.

Q. A statement. Will you state what that was, please, the substance of it?

A. The substance of this, of Mr. Travis's statement was that there was going to be a meeting of the Steering Committee, members of the Steering Committee were present, and this was one meeting I would not be attending. He stated that Joe Brant, Trade Union Secretary for Ohio, was in my office and wanted to see me.

Q. That was the substance of what took place at that time?

A. Yes.

Q. Now, following the Die Casters meeting in Cleveland in April was there a meeting of the Mine-Mill Executive Board following that?

A. Yes.

Q. Where was it held?

A. Chicago.

Q. Do you recall where in Chicago the meeting was held?

A. My recollection was it was held in a hotel, but I don't recall which one.

Q. About how long after the Cleveland meeting was the Chicago Board meeting?

A. My recollection is that it was held within one or two [fol. 139] weeks after that.

Q. Now, who was present at this meeting in the hotel in Chicago?

A. Present were the members of the International Executive Board, the general counsel of the Union, and myself, Harold Sanderson, Bernard Stern, Irving Dichter, Herman Clott, Ernest Love, and others. These are the names I can recall at the moment.

Q. Well now, I think to clarify it might be well to name who of the Executive Board were present.

A. Jack Clark, Maurice Travis, Wesley Madill, Chase Powers.

Q. Did you mention Mr. Dichter?

A. I believe I did, sir.

Q. And did you mention the name of Skinner?

A. I mentioned their names but not as members of the Board.

Mr. Witt: Just a minute, Mr. Witt (sic). We object to these—

The Court: I think the objection is sound. I mean Mr. Kelley can have the answer read back if he has any question about, but you may proceed.

Q. Do you recall any others that were present?

Mr. Witt: It is kind of confusing now. Mr. Kelley asked the witness to give the names of the members of the Executive Board.

The Court: That is what the witness is doing.

Mr. Kelley: Yes.

The Court: I don't know whether he completed it or not.

Q. Have you named the members of the Executive Board who were present?

A. I named the members of the Executive Board present that I recall at the present moment. There were members who were not members of the Executive Board too.

Q. And were there staff people present?

Mr. Witt: I object to that. The people he has named already before he named the members of the Executive Board were staff people, and all Mr. Kelley is doing now is continuing—

The Court: I think that's right, Mr. Kelley, he has named them.

[fol. 140] Mr. Kelley: All I am trying to do is to show who was there. This man has testified before, and he is doing it to the best of his recollection. It is along toward the end of the day, and I just—I have always been under the impression after one had exhausted his recollection you had a right to refresh his memory, but apparently counsel doesn't think so.

The Court: That is not what you are doing as I view it. Nevertheless, the witness has testified that those he has named he recalls, and he says there were others that he doesn't remember. Let's let it stand there.

Mr. Kelley: All right.

Q. Now, did Mr. Travis make a statement at this meeting?

A. Yes.

Q. And do you recall the substance of the statement made by Mr. Travis at the Board meeting?

A. Yes.

Q. Will you relate it, please?

A. Well, the substance of the statement made by Mr. Travis there was, he gave the meeting, the members of the International Executive Board and other people there a report on the Die Casters meeting we held in Cleveland which I earlier described, and he stated what had happened at the subsequent meeting in Cleveland with the Die Cast staff and urged the Board to reiterate is (sic) previous position in regard to not signing the affidavits and in opposition to the proposals that we had adopted in the Die Casting Division of the Union.

Q. Was there action taken by the Board at that time?

A. Yes.

Q. And do you know what the, was there a resolution passed, some formal action taken?

A. Yes.

Q. What was the nature of the action taken by the Board at that time?

A. A motion was passed reaffirming the previous position and rejecting the proposals of the Die Casting Division of the Union.

Mr. Witt: If Mr. Kelley is finished with this line, if the Court please, there is a motion we want to make.

Mr. Kelley: I don't know what you mean by "this line".

Mr. Witt: Let me make clear what I have in mind, and Mr. Kelley can advise the Court and counsel. If I have [fol. 141] followed the testimony of this witness correctly, from the time he began to testify about the meeting of the Die Cast Council in April down to the Executive Board meeting he has just testified about there is nothing in any of that testimony that is relevant to the issues in this case. All that the witness has testified about relates to a difference with respect to the policy of compliance or non-compliance with Taft-Hartley involving by the witness's own testimony both people he calls Communists and people he calls non-Communists, so that there obviously is nothing in any of this testimony that has to do with the issues in this case even if he were talking about 1951 and 1952. All this amounts to is testimony about a difference in a trade union with people on one side of the issue and other people on the other side of the issue.

The Court: It does relate to the policy obviously with reference to the filing of the affidavits required by the Taft-Hartley Act. The objection will be overruled. I think we will take a recess now until morning at 9:30, and, ladies and gentlemen of the Jury, you will bear in mind the admonitions I have given which are that you should not discuss the merits of the case among yourselves or the testimony given by the witness until you retire for your final deliberations, and you should not, of course, talk to any person about the case nor permit anyone to talk to you. You should not read newspaper articles about the case nor

listen to television or radio broadcasts about the case. So, with those admonitions you may announce a recess until 9:30 tomorrow morning.

In Chambers

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Did you have something you wished to take up with the Court, Mr. Witt?

Mr. Witt: On the question of the continuing objection, your Honor, may it be understood that we have a continuing objection to all testimony from any witness relating to the period before August, 1949?

The Court: Do you see any objection to that, Mr. Kelley?

Mr. Kelley: No.

[fol. 142] The Court: I think in effect—

Mr. Kelley: I think that is the way to handle it.

The Court: I have ruled several times on that point, and my impression is that there is already in the record a statement by Mr. Witt that they wish to have a continuing objection to the admission of any testimony on that basis, and I see no objection to letting the record so show now if it is not already in there. What else did you have?

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[fol. 160] KENNETH ECKERT, resumed the stand and testified further as follows:

Direct examination (continued).

By Mr. Kelley:

Q. Thank you, Your Honor. May it please the Court, ladies and gentlemen of the jury. Mr. Eckert, I think when we recessed last evening you had just testified about an executive board meeting in Chicago in the spring of 1948. Now, following that executive board meeting do you recall whether or not there was a meeting of the executive board held in Denver?

A. Yes.

Q. And do you recall about when that was?

A. To the best of my recollection I believe that was in May.

Q. Now, who was present at that meeting?

A. The officers and international executive board members of Mine-Mill & Smelter Workers, including Mr. Travis, myself, the members of the Steering Committee, and other members of the Mine-Mill & Smelter Workers who had been instructed to attend the meeting.

Q. Now, did Mr. Travis make any statement at that meeting?

A. Yes.

Q. Will you state what he said?

A. The substance of the remarks of Mr. Travis was in support of a resolution which had been introduced to the conference by he or—and his associates—and in opposition to another resolution which had been introduced by Wesley Madill and myself. That was the general nature, substance of the conversation.

Q. And was there action taken at that meeting in reference to the matter about which you have just opined?

A. Yes.

Q. And what action was taken?

A. The conference adopted the resolution advocated by Mr. Travis and his associates.

Q. Now, I believe you stated early in your testimony that you were in the Communist Party until sometime in 1948, is that correct?

A. Yes.

Q. And will you state when and how your connections with the Communist Party terminated?

Mr. Deikman: Objection. It is a matter of no relevance to this trial how his termination with the Communist Party arose.

[fol. 161] The Court: What is your theory on that, Mr. Kelley?

Mr. Kelley: May it please the Court, it is our theory that the manner in which this witness' severance occurred has a material bearing, and there are logical inferences that can be drawn from it as to whether or not the alleged

resignation of Mr. Travis actually took place. It is a circumstance that would bear on the main issue in the case.

Mr. Deikman: There is no reasonable way in which the experiences of this man can be attributed or related to an entirely different man, Your Honor.

Mr. Kelley: They were both members of the Communist Party, Your Honor, and I think that the jury can draw something from that. I think his objection goes to the weight.

The Court: I think I will overrule the objection; you may answer the question.

Q. If you will first state when and then the manner in which it was done.

A. In 1948 after this meeting in Denver which I just testified to, as near as I can recall I believe it was sometime in July following another meeting of the Die Casting Division of the Union.

Q. Now, how were you notified of the fact that you were no longer a member of the Communist Party?

Mr. Witt: Object to it. There is no foundation for that question; the witness hasn't testified that he was notified.

The Court: I am inclined to sustain that objection. Your initial question was what means the witness took or what process was followed in terminating his connection with the party.

Q. Can you amplify that answer, Mr. Eckert, as to what method was taken in severing your connection with the Communist Party?

A. Well, following my actions of violating party discipline I read in the official organ of the Communist—

The Court: Wait a minute.

Mr. Witt: Object to that.

[fol. 162] The Court: There is no evidence here what violations or anything else; I thought you were simply going to ask him the procedure that was availed of to terminate his connection with the party.

Mr. Kelley: That is it, and I think, Your Honor, the record shows that the meeting in Cleveland following the action of the Die Casting Division to comply with Taft-

Hartley, that the functions of Mr. Eckert as the head of the Die Casting Division were taken away from him and given to Irving Dichter.

The Court: That was union action, if my memory of the testimony is correct.

Mr. Kelley: It was the result of action taken by the balance of the Steering Committee, as I recall the testimony.

Mr. Witt: Mr. Kelley is incorrect.

Mr. Kelley: If I am incorrect I—

The Court: The Steering Committee was an agency of the Union.

Mr. Kelley: No, no, it wasn't, Your Honor.

The Court: It was a committee of the Union.

Mr. Kelley: It was a committee of Communists in the Union.

The Court: The personnel may be debatable, but the committee was a committee of the Union, but this answer that he started to give I don't think is a thing that opens up a whole field. I don't think it is proper. I understood what you were aiming at was to state what was done.

Mr. Kelley: That's just exactly what his answer will show was what was done.

The Court: The jury will disregard that last answer, and ask him that question and see if we can find out.

Q. All right. Did you receive any official notification [fol. 163] from the Communist Party that your membership had been terminated?

A. I read about my expulsion.

Mr. Witt: I move to strike that answer and this witness should be instructed to answer questions yes or no.

The Court: The motion is sustained.

Mr. Witt: And not to advise counsel how to ask him questions.

The Court: The motion will be sustained.

Q. Can you answer that yes or no?

The Court: The jury will disregard that.

A. No, I did not receive an official notification.

Q. Then how did you become apprised of the fact that you were no longer a member of the Communist Party?

Mr. Witt: He hasn't testified that he was advised in any way that he was no longer a member of the Communist Party.

The Court: I don't think he has either, Mr. Kelley.

Q. Did there come a time when you learned that you were not a member of the Communist Party?

A. Yes.

Q. Now, did you resign from the Communist Party?

A. No, I did not.

Q. How was your membership in the Communist Party terminated?

A. By expulsion.

Mr. Witt: Your Honor, I move to strike that answer, and I think I can show if I were permitted to examine the witness on voir dire that the implication he means to leave by that answer is completely incorrect.

The Court: No.

Mr. Witt: It shouldn't be left to cross examination.

The Court: I think I will deny the motion to strike and let the answer stand.

[fol. 164] Q. Now, Mr. Eckert, did there come a time when your affiliation with the Mine-Mill Union terminated?

A. Yes.

Q. And when did that occur?

A. In June of 1948, to the best of my recollection.

Q. And how did that occur?

A. By my proposing a resolution to the Die Casting convention to secede—

The Court: Wait a minute; I don't think that is responsive.

Mr. Kelley: Yes, I think it is, Your Honor. This is the way that it came about.

The Court: That may be what he thinks the reason was, but it was accomplished either by some action on the part of the Union or on his part by way of resignation or something.

Mr. Kelley: No, Your Honor, I can state to the Court that this is how it occurred; I mean, that he is answering the question properly.

Mr. Witt: Mr. Kelley shouldn't be testifying.

Mr. Kelley: May we approach the bench, Your Honor?

The Court: He is attempting, as I understood his answer, to explain why something happened. The question is how was his membership in the party and the union terminated, not the reasons for it.

Mr. Kelley: No, we are not trying to establish why, Your Honor.

The Court: He said he was separated from the Union sometime in June, 1948, and you asked him why.

Mr. Kelley: No, I did not; I asked him how it came about, the process by which it was done.

The Court: I don't know that that would be relevant here. The reasons, unless there were something stated in a formal nature, his conclusion—just take the analogy of somebody being discharged from a position. The fellow who was discharged may attribute an entirely different reason than the Union attributed for discharging him. [fol. 165] What I am trying to find out is was there any official action taken or—

Mr. Kelley: That's just exactly what the answer will show, Your Honor. May I recall to the Court that Mr. Witt in his opening statement made the statement—

Mr. Witt: This is argument to the jury; we object to it. Mr. Kelley asked to approach the bench out of the hearing of the jury.

The Court: The Court has spoken so the jury could hear.

Mr. Kelley: The jury heard the opening statement; it was to the effect that this man was fired from Mine-Mill. Now, this will show the manner, this is directly in the issue, and I can tell the Court if counsel will approach the bench I will make an offer of proof on it.

Mr. Witt: Mr. Kelley is entirely mistaken when he says that I stated that this man was fired. I stated that three of the other prosecution witnesses were fired, but I did not say that this man Eckert was fired.

(Discussion at the bench out of the hearing of the jury and the reporter.)

Mr. Witt: I am sorry; the witness can hear all this. I think this is improper.

The Court: I think the next time we are in chambers you can bring up this matter and we will discuss it then.

By Mr. Kelley:

Q. Now, Mr. Eckert, from your experiences in the Communist Party from 1931 to June, 1948, from your membership in the party during that period and from your attending classes in Communist Party schools during some of this period, do you know whether or not there was a policy on resignation from the Communist Party?

Mr. Witt: Object to it, Your Honor, on the grounds I thought we had cleared up in chambers. I think we better approach the bench on it.

[fol. 166] The Court: I think the form of the question better be changed and I will sustain the objection to the form of the question. I think you could simply ask him if he knows what the policy was without this preliminary foundation or question, or the preliminary statements in your question.

Q. Mr. Eckert, do you know whether or not there was a policy on resignation from the Communist Party during the time that you were a member of the party?

A. Yes.

Q. And will you state what that was?

Mr. Witt: Object to it, Your Honor, no foundation for it. Secondly, since this man has testified that he was out of the Communist Party in 1948, whatever policy the Communist Party had on this question in 1948, if it had a policy, is not binding on the defendant with respect to a resignation a year later.

In the next place, what the prosecution is seeking to do with this question is to usurp the functions of the jury, and have this witness decide for the jury on the matter of the defendant's resignation in 1949. The witness hasn't

even stated any experience in the Communist Party with respect to that, so even with respect to the period from 1931 to 1948 there is no basis r it.

Mr. Kelley hasn't asked him. what the written rules of the party were, if any, on the subject, what was contained in the party's constitution on the subject, if anything was contained in it.

Mr. Kelley: We can lay a lot of background, I mean foundation for the question.

The Court: I think, though, if there was a policy—start on that premise—or any rules or regulations, as distinguished from policy, with respect to whether or not a person could resign or couldn't resign or the procedure to be adopted for resignations, why, the best evidence, of course, would be the constitution or the by-laws or the controlling document of the party, and not someone's statement about that. Now, there has been no foundation. Secondly, assume there was a rule or was a policy in 1948 up until that time during the period this witness was a member of the Communist Party. What relevancy would that have to the [fol. 167] question of determining whether or not a resignation was effected in subsequent years?

Mr. Kelley: Well, your Honor, if we bring him up to June of 1948 and this resignation is in 1949, slightly over a year later, there would be a presumption of a continuance of that policy.

The Court: I am not sure about that, because I think it is incumbent upon the Government if it is in issue to show what the situation was in 1949, and I am not sure that that principle of continuance of the policy as it existed, suppose, to illustrate what the Court is thinking about, suppose that in 1948 there was a prescribed procedure for resignations whereby they could be given in certain form and have certain effects and the witness so testified, that certainly would not be conclusive on the Government with respect to what the policy was in 1949.

Mr. Kelley: We are not claiming that this is conclusive on the defendant, your Honor. This is merely part of our case, part of our evidence, and there will be more evidence covering other periods relating to the same problem.

The Court: Well, this witness admittedly, I gather from the foundation that has been laid and his own testimony does not profess to be acquainted with the policy in 1949 when the resignation we are concerned with here was purportedly given.

Mr. Kelley: Well, I haven't inquired of him as to that period. He was not in the Party at that time, and—

The Court: Well, I think until that is established, I think I will sustain the objection. They have a right to know how he would be acquainted with the matter, and also, as I say, the controlling factors it seems to me would be the rules or regulations or by-laws or something of the Party itself if such existed.

Mr. Kelley: Do I understand the Court to suggest that we should lay some foundation for the basis of his knowledge?

The Court: No, the very first thing is, if the question can be established with reference to—just take an ordi-
[fol. 168] nary situation, an action of, say, a corporation, if they have a constitution, if they have a set of by-laws that covers the matter, why, of course, no witness can testify orally with respect to the matter, the constitution and by-laws would be the best evidence. If there aren't any such or they cannot be obtained or some situation that developed which permits secondary evidence, then it would be admitted. But there has been no foundation laid on that basis.

Mr. Kelley: All right.

The Court: Secondly, I do not know, as I say, that this witness up to date, it may not be developed, but the critical question is what effect or what the situation was in 1949 with respect to this alleged resignation, and, if the witness is able to state what the rules of the Communist Party were at that time with respect to resignation after a proper foundation is laid, that might be proper, but I question whether his testimony about what the policy was in 1948 would be properly admissible.

Mr. Kelley: Well, your Honor, as I understand it, the problem is whether or not it is remote in point of time, is that it?

The Court: No, it is whether it is relevant on this basis. As I tell you, again, to illustrate what I am talking about, suppose there was—that the witness could testify in 1948 there was a certain policy with respect to resignations, the point I am making is that that would not have any relevancy whatsoever to the situation in 1949 unless there was a showing that there had not been a change in the policy.

Mr Kelley: Well, let me ask him the question about the rules and regulations and dispose of that first.

The Court: All right.

Q. Mr. Eckert, do you know whether or not the constitution or the by-laws of the Communist Party contained any provision relating to the policy of resignation from the Party?

Mr. Witt: That is during the period of 1948?

Mr. Kelley: In 1948.

A. I don't know what the constitution of the Communist [fol. 169] Party in 1948 may have said in regard to that.

Mr. Kelley: Well, your Honor, I would ask that we have an opportunity to get ahold of the constitution of the Communist Party which I think may be available to us before completing this witness's testimony.

The Court: You may do that, and I would add not only I think there should be an investigation with respect to the constitution but also as to any by-laws or whatever they are called, I do not know what they would be called, but I think it is perfectly obvious, if you had a written rule that was in force at any given time, why, that would be the thing that controlled.

Mr. Kelley: Well, I think—

The Court: If there is such a rule, unless it can be shown that the instruments are not available or something like that in a rather certain way, of course, the witness could not give an opinion any more than you could call somebody to testify what a statute of the United States said where the statute itself would be the best evidence.

Mr. Kelley: It is possible that the constitution and by-laws would not be available to us and it would be a little more difficult to get.

Mr. Witt: In any event, your Honor, the witness has said he doesn't know.

The Court: That is just what I was going to say to Mr. Kelley.

Mr. Kelley: We would like an opportunity to check that, and we would also like a further opportunity to discuss this matter in Chambers, if the Court please.

Mr. Witt: We would object to any further testimony from this witness on this issue.

The Court: We will make (sic) until Mr. Kelley makes his study and finds out what he wants to do, and he can recall the witness. Do you have any further examination of this [fol. 170] witness except for these matters?

Mr. Kelley: No, this will conclude this witness's examination, your Honor, as soon as we have had an opportunity to investigate this matter and discuss it with your Honor.

The Court: How much time is going to be involved in finding out about the matter? The primary thing that I am interested in, as I have said several times, is whether there is anything in the rules or the constitution or the by-laws written that would cover the matter of resignation or something of that sort. This witness says he doesn't know, and, if he doesn't know, there has to be a showing that there is not, and then there would have to be a showing that the instruments themselves were not available and some reason given for that inability to produce them, and then at that time, why, secondary evidence could possibly be received. How long is it going to be before you know what the fact is about that?

Mr. Kelley: Let me confer here just one moment.

The Court: Yes.

Mr. Kelley: Your Honor, I would suggest that we adjourn until after lunch because of the time it will take not only to make the search but for the conference in Chambers knowing how those are prolonged, and I am sure we can clear the whole matter up in that period of time.

The Court: All right.

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[fol. 191]

In Chambers

Court's Ruling on Admissibility of Testimony

The Court: Does anyone have anything to offer about this subject in addition to what was said before the recess?

Mr. Kelley: No, I think we have probably all said at least enough, if not too much, your Honor.

The Court: Well, during the recess period I have been doing a little reading about the matter and considerable thinking about it. In our approaches this morning I think, as the record will probably show, I thought for a while that probably this was out of the area of expert testimony, the area where a witness expressed an opinion on the basis of what I thought the witness might testify to something as a fact. To illustrate what I mean, I would think if a witness was asked, say, in a case, the firm of Smith & Company, or whatever name you wish to use that could be attached, employed people under twenty-one years of age, the witness could answer that they did not. That I don't think would be a matter of opinion. That would be testimony as to a fact.

Now, if you ask the same witness, "Do you know what the policy of Smith & Company is about hiring people under the age of twenty-one years?" and he testified the policy was that they hired no one under the age, why, you are confronted with two types of testimony. The first would be as to the fact; the second might come in the category of opinion testimony.

Now, from the trend of the questions here just before we recessed in open court, the questions propounded. I am inclined to think that this probably comes in the realm of expert testimony, because the question was propounded on a more or less hypothetical basis, and I don't know that the end result is any different. In the first place, if it is opinion testimony and expert testimony, why, of course, there has to be a proper foundation laid to qualify the expert before he is permitted to express an opinion. Now, [fol. 192] as I pointed out from the record this morning

in the prior trial apparently there were a considerable number of questions. I don't know the exact volume, but at least considerable testimony with respect to schools that the witnesses had attended and possibly other kinds of gatherings that were strictly limited to Communist Party matters, and that apparently was part of the foundation relied upon in the other trial for permitting him to answer the question about what has been called here as a policy of the Communist Party with respect to resignation from the organization.

Of course, the defense rather strenuously objected to this testimony, for instance, particularly the meetings in Moscow and things of that nature, as being of a highly prejudicial nature that even conceivably if admissible would have the effect of prejudice in the trial and would justify their exclusion on that basis, and so the Court, I think, more or less suggested to the Government that we might wait until this question arose and then decide what would be done about these questions that lay the foundation for an expert to testify as to a matter of opinion. That is about the situation we are in now.

Now, the evidence shows that the witness was a member of the party during the period he testified, at least with respect to Mr. Travis' connection with the party according to his testimony from 1941 until 1948 when the witness testified he was expelled. The evidence shows that the witness during that period of time was in close association with officials of the Communist Party. He has testified specifically in detail with respect to several what might be called policy meetings of the committee of the union, which he testified was composed entirely of members of the Communist Party, and of this meeting in New York of which something has been said; also of conversations with officials of the Communist Party at other times in connection with these meetings of the committee that has been testified to; so my own feeling is at the moment the witness is sufficiently qualified to answer this question, if it is otherwise proper.

The question of the ability of the witness to express an opinion, of course, is a question for the jury just like everything else in the case. The Court has to be satisfied prima

facie that the witness does qualify to express an opinion, [fol. 193] but the weight to be given that opinion is to be determined by the jury, and of course among other considerations the jury can take into consideration the knowledge of the witness about the transactions he purports to give an opinion on, and all of those things, so I think that subject is one that should properly be covered by instructions to the jury, and I think there has been a sufficient foundation here laid to permit the witness to testify as an expert with respect to this particular matter.

I think the defense would have a right, if they wish, to go into the question of where he derived this information, the source of his knowledge, and things of that nature, for the purpose and with the view of detracting from the weight the jury might give his testimony.

Now, with respect to the admissibility of the evidence, I am influenced very considerably by the Government's statement here that the matter will be connected up, and what I understand by "connection" is that there will be evidence from which the jury can infer that Mr. Travis was fully acquainted and had personal knowledge of this policy. I agree with the defense counsel that the membership which this witness contends was the status of Mr. Travis in itself would not impute to him any knowledge of policy or anything of that sort unless it had been expressly called to his attention, unless he subscribed to it and acted in pursuance of it.

Now, we all know that you cannot prove the whole case by one witness. The United States said that there will be evidence presented in the course of the trial that will show the connection, as they call it, or the fact from which knowledge can be inferred, and also, of course, of conduct which would amount to subscribing to the principle and following the principle, in fact.

Again I think that the objection will have to be overruled at this time on that basis. I might say at the moment I think there is something, we have been over it, I am not going to re-state it, about this meeting in New York, coupled with a subsequent meeting in Chicago in which Mr. Travis individually discussed with one of the officers

of the Communist Party the policy with respect to these affidavits. There could be some inferences down along the line the Government argues for in that connection.
[fol. 194] I am not passing that question because it is one for the jury, and naturally the matter should be left to the jury under proper instructions. Ie feel that there should be an instruction given along the lines of Mr. Deikman's statement this morning about there couldn't be knowledge imputed from the mere fact of membership alone, or something of that sort, along with one about expert testimony and expert witnesses and the manner in which the jury might consider their evidence.

Now, that brings us up to this 1948 date, being the time when this witness terminated his membership in the Union. Now, that standing alone if there was no other evidence in the case, of course, I question whether the Government could be said to have established the fact or apply that policy to something that happened in 1949, but I gather that from what Mr. Kelley said that with the other it will be connected up in such a manner that the Government will affirmatively show that the same policy that existed in 1948 continued down to the dates involved in the indictment period. I think this evidence in 1948 is pertinent along this line, because there has been testimony, for instance, about this New York meeting and this conversation I just mentioned of transactions within this period that relates to the closeness, if that's the word, or the degree of Mr. Travis' association with the Communist Party, and so the policy then in force with respect to this matter would be proper for consideration by the jury in determining ultimately, if it is established as the Government said it will, that the same policy existed in 1949, for the simple reason that if things were done in 1948 the same policy and the same conditions obtained on through a subsequent year, that what was done in 1948 or what the thinking was at that time would certainly have a bearing on what the situation was in 1949.

I have reached a conclusion that the Government may be permitted to inquire without laying any additional foundation as to whether the witness is acquainted with the policy

with respect to this matter, and then if he states affirmatively that he was—I think he already has gone that far—that he may then be asked what the policy was, and I think also that the record might show that the defense may, of course, have a continuing objection to this line of testimony, and they have, I think, objected very specifically to this particular question; but, I want the record fully protected so there will be no question about their objections.

[fol. 195] Mr. Kelley: I am not sure just how the record stands, whether the answer that he did know was stricken or not.

The Court: I don't think it was, but I think it would be entirely proper for you to renew the original question whether he did know, and then ask him the question with respect to what the policy was.

Mr. Kelley: May I ask him substantially the same question I asked him before?

The Court: I am not passing on the form of your questions; but, I wouldn't want to prescribe a certain form of question.

Mr. Kelley: There was some indication at one point that I should just ask him—

The Court: One other thing that I want the record to show that was discussed in the courtroom that I had, I think, more apprehension about than my reflection tells me was warranted. I thought that you had to make a prima facie showing to begin with that if a question of policy was involved, what the regular rules and regulations or constitution or something of the Party provided. The more I think about it the more I feel that that position I was advocating was not too sound, because if the practice was to proceed on a certain matter, even if there was some regulation or something of the company against it, then I think the evidence of the practice or the policy or whatever you wish to call it would probably still be admissible without reference to what the basic rule was. For instance, it is not hard to think of dozens of cases in which the principle might come up would be that if, for instance, there was a prescribed rate for certain work or something of that nature in some rule or regulation, or prescribed length

of service or something, and the fact was that over the years that rate had never been paid and that some other rate prevailed, I think extrinsic evidence with reference to what the actual practice and policy was would be admissible without reference to what the basic written constitution or by-laws amounted to, so I think I was probably unduly concerned about something that isn't a problem at all.

Mr. Witt: Your Honor, I think we have made our record [fol. 196] on it. I am not sure it has been fully expressed, but in any event we renew the objections that we made in open court this morning to the questions along this line. I am not sure I gave as a reason the best evidence rule. May the record show that that is an additional ground that we have for objecting to these questions.

The Court: All right, and the record may show, as I think it does sufficiently anyway, but so there will be no question about it, that the objections made by the defense are overruled.

In Open Court

KENNETH ECKERT, resumed the stand, and testified as follows:

Direct examination:

By Mr. Kelley (Continued):

Q. Mr. Eckert, from your experience in the Communist Party and from your membership in the Communist Party during the period from 1931 until the time you left the Party in 1948 do you know whether or not there was a Party policy on resignation from the Communist Party?

Mr. Witt: Your Honor, I suppose it is unnecessary for us to have the record show that we still have the same objection.

The Court: I will say to the Jury after hearing the presentation of counsel that I have overruled the objection of the defense to this line of interrogation.

A. Yes.

Q. And will you state what the policy of the Party was in that respect? A. The policy of the Party was that once having joined the Communist Party you could not leave without being expelled.

Mr. Kelley: That concludes the Government's direct testimony, your Honor.

[fol. 197] MOTION FOR PRODUCTION OF DOCUMENTS, ETC.

The Court: Very well. Mr. Witt, you may proceed.

Mr. Witt: If the Court please, before proceeding to cross-examine this witness we move that the Government produce to the defense all reports, statements, and testimony from this witness, Kenneth Eckert, in the Government's possession. We make the demand with respect to all reports or statements made to any agent of the Government under Section 3500 of the Criminal Code. We make the demand for testimony with specific reference to the testimony of this man, Kenneth Eckert, before the Grand Jury in this Court in 1954, before the Grand Jury in this Court in 1956, and before the Grand Jury in any other district court, any Federal District Court in which the witness gave testimony related to the subject matter of his testimony in this proceeding on direct examination.

Mr. Kelley: May it please the Court, I would like to make this statement: that as to the reports which we have that are producible under 18 U.S.C. 3500 that all of them contain some material which does not relate to the testimony of this witness on his direct examination. Now, as to the testimony of this witness other than Grand Jury testimony it is all a matter of public record, and as to the Grand Jury testimony the Government objects to producing that for the reason that under the Rules of Criminal Procedure the proceedings of the Grand Jury are secret and to remain secret unless there are compelling reasons for the Court in its discretion requiring the production of it and in that event it is necessary to lay a foundation.

Now, in my view of the matter it seems to me that there may be some legal problems here and that probably is something that should be taken up in Chambers.

The Court: Do you have available the reports that were demanded? Are they here in Denver?

Mr. Kelley: Yes.

The Court: And with respect to those it is your position that part of them properly should not be furnished in their present form to the defense, is that correct?

Mr. Kelley: It is our position that we have none which in their entirety relate to the testimony of this witness [fol. 198] on his direct examination and that they will have to be submitted in camera for consideration.

Mr. Witt: Whether we do it now or whether we do it later in Chambers, your Honor, we will have to discuss what is the subject matter of his testimony.

The Court: Certainly. You have asked for these reports. The Government has them, but they say there are certain portions that should not be made available to you. Under the provisions of this Section 3500 which was enacted recently as a result possibly of the pronouncements of the Supreme Court in the Jencks case I understand now it will be the duty of the Court to look at these reports and determine according to that Section in the first instance what should be made available and what should not, is that right?

Mr. Kelley: That is my understanding.

Mr. Witt: Just to preserve our record on that, your Honor, as we stated in Chambers, if there is no question in the mind of the prosecution that the reports or statements do relate to the subject matter of the witness's testimony on direct, then the defense is entitled to have those statements without their first being examined by the Court.

The Court: I understand their contention is that they are not in that category, is that right?

Mr. Kelley: That's right, your Honor.

In Chambers

COLLOQUY RE MOTION TO PRODUCE AND RULINGS THEREON

The Court: Now, do you have the reports available, Mr. Kelley?

Mr. Kelley: Well, we didn't bring them in at this time, Your Honor. I think we had a few; I wouldn't hazard a guess, maybe seven, eight reports that we were reviewing

this morning in connection with the scope of the testimony yesterday, and we came in here at this time to see whether we were going to have to produce grand jury minutes and what else.

The Court: When can you produce these statements?

[fol. 199] Mr. Kelley: If we have a half hour I am sure, or less, to do it. Now, this noon we had no time, I thought we could finish it at noon, but we just barely got back from lunch in time to get down here.

The Court: I notice one of your associates is missing. Is he up doing the checking?

Mr. Kelley: No, he is up getting another memorandum on a matter we thought might come up at this time.

The Court: Is somebody examining these reports, or are you making some progress in getting them ready?

Mr. Kelley: Not right at the moment, because as I understand it I have to make the statement myself as to their having any reports relating to the testimony.

The Court: The statute says:

"If the United States claims that any statement or order to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the Court shall order the United States to deliver such statement for inspection of the Court in comera." (sic)

Now, what is your understanding of the procedure under that section?

Mr. Kelley: The only thing that we want to be in a position to do is to state to the Court as to each report, or it was my thought that there are certain portions of the report we feel should be excised.

The Court: Does that go to each and every statement?

Mr. Kelley: Every one that we have that relates in any way to the testimony of this witness contains the matter on other subject matter.

The Court: How long do you think it would take you to complete your checking of them so that you will know?

Mr. Kelley: I can do it in a half an hour or less, maybe [fol. 200] fifteen or twenty minutes, if I could get an uninterrupted fifteen or twenty minutes I think I could do it, complete the job.

The Court: Now then, let's go to these other areas for the moment here, so that we can determine if possible at this time about these other matters. Now, first I will let the defense take them up in the order they want to and discuss the grand jury reports.

Mr. Witt: I think perhaps it would be more logical if when Mr. Kelley says he is going to produce, if he means by that he is referring only to documents in the possession of the FBI, then we want to discuss the remaining problem under 3500 first.

The Court: So there can be no mistake about it, the statute, as both of you know, provides that:

"After a witness called by the United States has testified on direct examination the Court shall on motion of defendant order the United States to produce any statement as hereinafter defined of a witness in possession of the United States or in relation to the subject matter to which the witness has testified."

Now, I understand that the documents you are referring to, Mr. Kelley, are the only statements or reports in the hands of the Government that pertain to the testimony of this witness, that's right, isn't it? In other words, what I think the implications are here, and I gather in the motion, we have talked about the FBI. The statute doesn't limit the demand to the FBI. It says "Any statements or reports in the hands," in the possession of the United States.

Mr. Kelley: In the possession of the Government.

The Court: Yes.

Mr. Vincent: If Your Honor please, I don't think the statute reads "or reports."

Mr. Kelley: "Statements."

[fol. 201] The Court: Any statement, yes, that's right; "reports" is up in (a), which hasn't anything to do with this.

Mr. Vincent: As defined in Section (a).

Mr. Kelley: In answer to your question, Your Honor, and in answer to Mr. Witt, to my knowledge the only statements made to the executive branch of the Government by the witness were made to the FBI, so that thes statements which we will produce and turn over to you will be FBI reports. If Mr. Witt's demand encompasses, as he indicated

a few days ago, statements made to congressional committees in executive session or something of that kind, it is our position that those are not encompassed within the purview of 3500, and we are not in a position to produce them, and I don't think that the United States' Attorney's office nor the Department of Justice can tell or order the executive branch of the Government or the legislative branch of the Government around, so we have nothing in that category.

Mr. Deikman: Your Honor, I think Mr. Kelley misunderstands what the point of our motion is in regard to reports other than FBI reports. I am speaking of our demand under Section 3500. We have demand or motion under the other areas of law, but speaking under 3500 and speaking only to that subject right now, we also move that the prosecution be required to produce any written statement made by the witness Eckert to the United States Attorney or any other agent of the Government. Now, we do so under the law which I have stated.

The Court: What do you mean by "any other agent of the Government"? I am trying to find out basically about the existence of any such items and what you are talking about. What do you encompass in your definition of an "agent of the Government," or does that include, as Mr. Kelley suggested, any statements they made to a congressional committee or something of that sort?

Mr. Deikman: I haven't checked with Mr. Witt on this, but that's not what I am speaking to (sic) right now.

Mr. Witt: I will address myself to that later.

Mr. Deikman: What I am speaking of right now is any [fol. 202] report or statement by this witness in their files made out to the U. S. Attorney or any agent of the U. S. Attorney or any other agent of the executive branch of the Government which they have in their possession. Now, as I said, this is not only a motion which is made under Section (e) 2 of the law, but Section (e) 1 as well, which does not require that it be a statement made to a Governmental agent, but any written statement made by the witness and signed or otherwise adopted or approved by him.

Now, our information of what is contained in the Government's file is rather sketchy, but we do have knowledge

of practice on the part of the U. S. Attorney, and we do have knowledge that there are written reports, or we assume that there are written reports made in the U. S. Attorney's office by witnesses. Now, if Mr. Eckert didn't make any such reports then, of course, they can't be produced, but if he did make a written statement to the U. S. Attorney, whether it be Donald Kelley or Thomas Mitchell or any other U. S. Attorney, we are entitled to its production.

Mr. Kelley: Well, in the first place they are talking about work product.

The Court: First let's develop what the fact is about the existence of any reports.

Mr. Kelley: Well, Your Honor, there is no such report as he is talking about, but if there was it would be in the realm of work product, and this 3500 certainly doesn't encompass the work product of Government lawyers.

Mr. Deikman: Well, I don't know whether I am talking to effect or not here. If there is no such report then we can leave to one side the question of whether it is work product. I think what we have to know from Mr. Kelley is: Is there any statement made by the witness Eckert to a U. S. Attorney or an agent for the U. S. Attorney? Let's cover that first.

Mr. Witt: A statement as defined in 3500.

Mr. Deikman: Yes.

Mr. Kelley: In the first place I don't think it is any of your business, and in the second place there isn't any such statement.

[fol. 203] The Court: You will take the second answer.

Mr. Witt: I was about to say Mr. Kelley should reverse the order of that.

Mr. Deikman: If it should develop on cross examination or at any stage of the trial that such is the case and such a statement was given and that Mr. Kelley is misinterpreting what I mean by "statement," then, of course, we will have the right to renew our demand.

The Court: We will proceed now on the basis that there are none in existence. Now then, pass to the next phase.

Mr. Deikman: Just one moment, Your Honor.

Mr. Witt: That's all right. May I address this to Mr. Kelley on this point before we leave it? Maybe we can clear it up.

The Court: All right.

Mr. Witt: Of course, when Mr. Deikman refers to a statement he is referring to a statement as defined in Subsection (e), which includes in paragraph two not only paragraph one, the statement made by him et cetera, but also paragraph two, a stenographic, mechanical, electrical or other recording or transcription thereof, et cetera.

Mr. Kelley: Let me ask you this: Are you referring to my witness sheet? Is that encompassed in your definition of what comes under this?

Mr. Witt: What do you mean by your "witness sheet"?

Mr. Kelley: The sheet that I work out for myself to determine the questions that I will ask.

Mr. Witt: As we read this that is defined as a statement by this witness.

The Court: I don't think it is, if I understand what you are talking about. If an attorney sits down and figures out a list of questions he is going to ask the witness I don't [fol. 204] see how that can be tortured into a statement at all.

Mr. Deikman: Mr. Kelley, was that recorded contemporaneously with the making of an oral statement on the part of the witness?

Mr. Kelley: I would be perfectly willing to show to the judge my notebook as to how I do this. The history of the act as it went through the Congress shows that that wasn't in the contemplation of Congress at all.

The Court: I am inclined to agree with that unless some further fact can be developed about it.

Mr. Deikman: Let's clear this up.

The Court: The definition you are relying on is a written statement made by the witness, signed, adopted or otherwise approved by him. I don't see how that would come under that category at all.

Mr. Deikman: We are talking about No. 2, Your Honor.

The Court: I think Mr. Kelley has answered this one. You haven't any stenographic, mechanical, electrical recording or other transcription, verbatim or substantially verbatim recital of any oral statement made by the witness to an agent of the Government and recorded contemporane-

ously with the making of such oral statement. Do you have anything like that?

Mr. Kelley: Other than FBI reports I have not.

The Court: That's what I understand you to say.

Mr. Deikman: Now, by "agent of the Government" the Judge is including there, Mr. Kelley, a U. S. Attorney, just for the purpose of argument at this time.

Mr. Kelley: I wouldn't know what other U. S. Attorneys might have, Mr. Deikman.

Mr. Deikman: We are talking about things that are available to the Government.

[fol. 205] Mr. Vincent: I think before we discuss what is in the possession of a United States Attorney we should determine in the first instance whether or not a United States Attorney's work product in any situation is encompassed in this statute. Now, as Mr. Kelley pointed out the legislative history specifically indicates that the work product of an attorney is not encompassed in the statute, and I think that's our first problem.

Mr. Deikman: I disagree with you, Mr. Vincent, on that. I am prepared to give the Judge the legislative history, and I am also prepared to give the Judge cases on what is meant by a "work product," and what the rules are in relation to it, but I think that that is getting ahead of ourselves. I think what we first have to determine is whether there is anything to argue about.

Mr. Vincent: I disagree with you, Mr. Deikman. I think that the interpretation of the statute should come first, but I leave that to His Honor.

The Court: If there is nothing in existence that would even come under their own interpretation of the statute, the problem would be solved right then and there. If there is something, why, that might present something else.

Mr. Deikman: Assuming that our interpretation of the statute is correct that the U. S. Attorney is an agent within the meaning of this act and any servant or agent of the U. S. Attorney is an agent within the meaning of this act, assuming that we are correct for the moment, is there in existence such material, such a statement?

Mr. Kelley: Well, again I come back to this question, pose this question: Mr. Eckert, for instance, testified in

El Paso, Texas in the Jencks case. He was handled down there by some Government attorney who worked out his own method of asking questions and so forth based on what Mr. Eckert told him, or based on reports of something else. I would have no knowledge of that, and that would be true as to the other places that he has testified, and I am sure that this Court isn't—

The Court: Let's be more specific. I still think what we are talking about is probably hypothetical. Now, I would [fol. 206] like to get specific here. I thought I understood, but apparently I haven't. Section (e) of this act says:

"The term 'statement' as used in Subsection (b, c, and d) of this section in relation to any witness called by the United States means, one, a written statement made by said witness and signed, adopted, or otherwise approved by him."

Now then, what in that category could possibly be in these work products. It isn't a written statement, I assume, by the witness, if some lawyer sits down and talks to the witness and makes a synopsis of what he is going to testify to, that wouldn't come in the category unless the witness signed it, and then it says, "Or otherwise adopted or approved by him." Now, what I would like to know as far as you gentlemen now representing the United States, if there is anything like that in existence other than the FBI reports?

Mr. Kelley: Other than the FBI reports and one statement that was—well, it is in our possession, and which we intend to produce. It would come within No. 1 under (e). We have one such, but it isn't—

The Court: You are going to produce whatever that is?

Mr. Kelley: Right.

The Court: Two says: "A stenographic, mechanical, electrical or other recording or transcription which is substantially a verbatim recital of the witness made to an agent of the Government and recorded contemporaneously with the making of such oral statement."

Now, do you know of anything like that other than what you intend to produce?

Mr. Kelley: No, sir.

Mr. Deikman: Assuming that "agent of the Government" means U. S. Attorney or anyone working for the U. S. Attorney—

Mr. Kelley: Well now, are you talking about the possession of them?

[fol. 207] The Court: It has to be a stenographic, mechanical, electrical recording or other transcription.

Mr. Deikman: Judge, the only thing Mr. Kelley is hedging about—

Mr. Kelley: I am not hedging, Mr. Deikman.

Mr. Deikman: —is the definition of "agent of the Government." What I am trying to get at, Your Honor—

The Court: What I am trying to get at, and I wish somebody would answer this, it is limited to a stenographic, mechanical, electrical recording or other transcription; whether it is made by an agent of the Government or somebody on the street. I am asking if there is anything like that around that you know of.

Mr. Kelley: I know of nothing other than the matters which we intend to produce to you.

The Court: That's what I understood your position to be, so if something develops later on in cross examination or something, I will listen to it, but I think we are just wasting our time talking about this phase of the thing, so now let's go on to the next thing. If you have any observations to make you can make them, but it seems to me that what is to be produced, whether made by an agent of the Government or anyone else, is limited with respect to stenographic, mechanical, electrical or other recording or transcription, which to me means like somebody sitting down at a deposition or by way of a formal statement to somebody. I understand the Government is producing all those that we have.

Mr. Deikman: We will leave this matter; I would just like to point out exactly what we had in mind. Sometimes it is the case—we don't know that it was the case in relation to Mr. Eckert, but sometimes it is the case that a U. S. Attorney in going over the case takes a stenographic, mechanical, electrical or other recording or transcription thereof of that witness' story about what happened. Using that the U. S. Attorney then prepares his case. Also I un-

derstand that it has been done by the U. S. Attorney's office here that a written statement is made by a witness and signed or otherwise approved by him.

[fol. 208] Now, we just want to make it clear that if there are such statements, even though it may not be the case in relation to Mr. Ecke., if there are in future cases, we include that in our demand for statements.

Mr. Vincent: What is that about future cases, Mr. Deikman?

Mr. Deikman: There will be other witnesses, I assume.

Mr. Vincent: You said future cases.

Mr. Deikman: Other instances.

Mr. Vincent: In the instant case.

Mr. Witt: In this case he meant, future witnesses.

The Court: Let's meet that if anything arises. At the moment I am satisfied from what has been said that there is nothing in that category, and when you produce these statements that you are talking about that those are all the statements the Government has.

Mr. Kelley: I have been assured that I have all of the statements of this witness given to a Government agent.

The Court: Now, what is your next point here?

Mr. Witt: Just to finish up on this one now, since we argue that an agent of the Government includes U. S. Attorneys and assistant U. S. Attorneys, and any lawyer in the employ of the Department of Justice or any other branch of the Government for that matter, we think it is incumbent upon the prosecution in this case to advise the Court whether there are any statements as defined in paragraph (e) of Section 3500 in the possession of the Department of Justice or any of the officers of the United States Attorneys.

Mr. Kelley: As I stated before, I wouldn't have any idea how other lawyers prepare their cases, and however they do it it is the work product and isn't encompassed within this, and I have made no effort to ascertain whether all of the lawyers that have worked on this case have proceeded in that manner. I have gotten everything that I know [fol. 209] about, any source that I know of has been checked out, and I am stating to the Court that I am producing

everything that comes within the category as I see the law. I don't think it includes work product.

The Court: I am inclined to agree with Mr. Kelley, and I doubt if it is necessary to pass on work product of attorneys. I question very seriously whether that is under the statute at all. The impossibility of the situation seems to me to be perfectly evident; and also the congressional intent seems to be perfectly evidence (sic). This statute, as I guess everyone knows, arose as a result of the Jencks case. The purpose is rather well defined. If there are any of these work products of lawyers around that may in the course of trying the case are, say, in chronological order the questions they intend to propound, and they make some notations about what they anticipate the testimony will be, I don't think that would come in the category here at all under (e).

Secondly, I think it is so obvious that Congress couldn't have had that in mind because the Court will take judicial knowledge of the fact that, for instance, Mr. Kelley's witness sheet that he calls it, or whatever he calls it, or anything these gentlemen have prepared here in connection with the trial, are not sent to any particular central agency. You would have these matters scattered all over the United States. There wouldn't be any practical or physical way at all of finding out about them, and I think the request that is being suggested here would be entirely beyond the possible scope of the statute, so I think we might as well proceed to some other phase of it.

Mr. Witt: Before we do, Your Honor, I want to make a statement in order to preserve our record so there will be no doubt about our position or Mr. Kelley's position. I am not sure I followed Mr. Kelley, but in any event it is our position that we are entitled to any statement as defined in paragraph (e) of Section 3500 so that we are not getting into what is or is not work product. We are putting it in terms of the definition of paragraph (e) of Section 3500. We are entitled to any such statement in the possession of the Government, any department of the Government, any agency of the Government, any agent of the Government, anywhere in the United States. Just one word in support of that, Your Honor, to indicate that we are not just shooting in the dark.

[fol. 210] Your Honor in the course of this case has heard references made to the Gold case. This man Eckert testified in open court in the Gold case, so it is fair to assume that he testified before the grand jury which indicted Gold.

The Court: Let's stay out of the Grand Jury field.

Mr. Witt: I am getting to that, your Honor. I have to get to it this way so you won't think we are just making noise.

The Court: All right.

Mr. Witt: I was just saying that since we know he testified in open court in the Gold case we assume or we infer although we could be wrong, but we infer that he also testified before the Grand Jury in the Gold case, the Grand Jury which indicted Gold. Now, in order to forestall any argument as to the definition of subject matter in Section 3500 in the Gold case in open court the witness Eckert testified about the defendant in this case, Travis, and specifically, he testified about the meeting in New York at the Trade Union Center in early 1948. He may have given other testimony about Travis in that case in open court, but, if he did, it slips my mind, but in any event we are referring to that, your Honor, to indicate to you that we are not just shooting in the dark, that we think there exists material which we are entitled to under the statute.

Now, if Eckert testified—

The Court: Let me get my thinking cleared up. Are you contending that you are entitled to the Grand Jury record or testimony—

Mr. Witt: I am sorry.

The Court: —either in this District or any other district under 3500 or what?

Mr. Witt: To finish up, I am sorry I confused your Honor by reference to the Grand Jury, but the point on the first issue is, since Eckert did testify in open court, the probability exists that he did make a statement as de-
[fol. 211] fined in paragraph (e) of Section 3500 to the United States Attorney or one of his Assistants in the District of Columbia, and under this statute it is incumbent upon the prosecution in this case to find that out if it is true and incumbent upon the prosecution to make the kind

of complete check which I indicated this statute requires. So much for that branch of it.

Now, again, not to continue the argument, your Honor, but to make our record, if 3500 is interpreted to exclude that kind of material which I have just discussed, then we say we are entitled to it under the Jencks case, and we are entitled to it as a matter of due process in getting a fair trial along the lines of Mr. Justice Brennan's opinion in the Jencks case.

If you want me to continue with the Grand Jury—

The Court: As I say, Mr. Kelley has categorically made answer to the question you propounded several times, and I am not inclined to go any further on the thing than we have right now, and as indicated with respect to statements I assume that these statements that are produced are all of the statements the Government has that come in the category as indicated in subdivision (e) of 3500.

Mr. Witt: Your Honor, I may have misunderstood Mr. Kelley, but Mr. Kelley stated for the record that the prosecution in this case has made no effort to check elsewhere with agents of the Government and with the Department of Justice to see whether there are any other statements as defined in Section 3500. That was Mr. Kelley's statement.

Mr. Kelley: Now, you are misstating the record on that.

Mr. Witt: It could be.

Mr. Kelley: I stated that I had made no effort to check the work product of lawyers that have handled this witness in other proceedings. The FBI has made a thorough search of all of its offices that have had any connection with any of the—well, with Mr. Eckert or anything that he has been connected with, and I have stated to the Court that I have in my possession those reports, and anything that has any, any report that has anything relating to the direct testimony of this witness will be produced and turned over to the Court.

[fol. 212] The Court: That satisfies the Court. So, let's go ahead with this next phase of it. That is the Grand Jury testimony, as I understood, or something. What is next?

Mr. Witt: As far as the Grand Jury is concerned, your Honor, our position is that Section 3500 has no bearing on that issue, and it is our position, as we stated to your Honor

last week, that the decision of the Third Circuit in the Rosenberg case, 245 Federal Second 870, which is the only appellate court ruling on the question which we are aware of since Jencks, supports our motion for the production directly to the defense of all Grand Jury testimony of this witness relating to the subject matter of his direct testimony in this case.

Mr. Kelley: May it please the Court, the Government has objected to the demand made by the defendant for the production of any Grand Jury minutes, because under Rule 6(e) of the Rules of Criminal Procedure it provides, "Disclosure of matters occurring before the Grand Jury other than its deliberations and the vote of any juror may be made to the attorneys for the Government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the Grand Jury only when so directed by the Court preliminarily to or in connection with a judicial proceeding or when permitted by the Court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury."

I think your Honor is familiar with the cases that hold that there has to be a showing, and it is my recollection that the cases which have permitted defendants to have Grand Jury testimony fall into about two classes: The first one is a case where it is a perjury indictment based upon statements made before the Grand Jury in which case it is necessary for the defendant to have it in order to prepare his defense, and the other cases are where the witness has made a statement on the stand or otherwise that he testified differently before the Grand Jury than he did on the witness stand, and it is contrary to the policy of the courts, and, further, in this case and in answer to the statement by Mr. Witt that he needed all of this stuff in order to have a fair trial, he has repeatedly stated both in open court and in Chambers that he has the transcript of the testimony of this witness before the CIO, which is not exactly verbatim, but it is a transcript of his statements in [fol. 213] regard to Mine-Mill and Mr. Travis, he has the

transcript of the Jencks case in which this witness testified, he has the transcript of this witness in the Gold case, he has the transcript of the witness before the McCarran hearings in Salt Lake City, and he has the transcript of this witness's testimony in this case on the previous trial.

The Court: Of course, all we are talking about now is the Grand Jury.

Mr. Kelley: But I am pointing out—

Mr. Witt: And the SACB I am talking about.

Mr. Kelley: This summer he cross-examined him extensively before the SACB.

Mr. Witt: I have one more so the record will be complete. I also have this man's testimony before the NLRB in the so-called decompliance case against Mine-Mill.

The Court: Have you seen this Rosenberg case?

Mr. Vincent: Yes, I have, and in regard to that Rosenberg case I would like to state that it was mentioned specifically in both Houses of Congress when they considered enacting Section 3500 they stated, and it is in the Congressional Record, that the Rosenberg case was one example of a misapplication of the Jencks decision which would disclose Grand Jury minutes, a proceeding heretofore unheard of, and they said that showed one of the reasons demonstrating the need for legislative enactment.

Mr. Witt: Now, Mr. Vincent, excuse me, your Honor, I think I can answer both Mr. Kelley and Mr. Vincent. If I followed Mr. Kelley, he concedes despite the reference to the secrecy Rule 6 (e) that there are circumstances under which the defense in a nonperjury case is entitled to Grand Jury testimony, and he has to concede it because there are just too many cases indicating it. He is referring to cases, and just along the line of them is the one in the Second Circuit which holds that, if on cross examination you show an inconsistency or contradiction and the witness indicates he might have testified differently before the Grand Jury, then, his Grand Jury testimony is made available to the Court for [fol. 214] inspection to see whether there is an inconsistency or contradiction before it is turned over to the defense if there is.

Now, that was precisely the issue in the Jencks case with respect to FBI reports, your Honor, you will recall. The pre-

vious practice then best exemplified in the Second Circuit was to require the defense to show a contradiction or an inconsistency on cross examination, then have the FBI reports turned over to the Court, examined to see whether they support the position of the defense, and, if they do, turned over to the defense.

Now, what the Court said in the Rosenberg case was that the thinking of the Supreme Court in the Jencks case with respect to FBI reports was also applicable to Grand Jury testimony, and the Court in the Rosenberg case specifically referred to one of the recent cases in the Second Circuit which exemplified the old practice. So, the Rosenberg case is authority for the proposition that the Jencks case assimilates Grand Jury testimony with respect to this problem, to the problem of FBI reports.

Now, as far as the Congressional history is concerned Mr. Vincent is correct that you will find in the Congressional history indications by one or more of the committees or one or more Congressmen or Senators, cases of disapproval of the Rosenberg case, but in any event that is not pertinent on this whole subject, your Honor, because the legislation which came out of that discussion simply didn't deal with the problem of Grand Jury testimony. Even though the entire Congress may not have liked the Rosenberg case they did nothing about it when they passed Section 3500, and they did nothing about it in any other statute, so, reference to Congressional disapproval of Rosenberg is beside the point and irrelevant. All it means is that a few Senators and a few Congressman (sic) indicated that they didn't like the case, and that doesn't advance us any.

The Court: I do not know what there is in the Jencks case that would extend the rule to Grand Jury testimony myself. If there is anything in that case that supports your argument, I would like to see it. I am inclined offhand to agree with these few Congressmen that talked about the thing. I do not believe the principle of the Jencks case extends to Grand Jury testimony at all.

[fol. 215] Mr. Witt: May I say this one word on it?

The Court: Yes.

Mr. Witt: Of course, your Honor is right if what your Honor says is that the opinion does not refer to Grand Jury

testimony. That is true. But what the Court said in Rosenberg and what we say is that the philosophy expressed in the Jencks case is just as fully applicable, to-wit, that it is the responsibility of the Government to see that justice is done, and that means that, if the Government has anything in its possession which helps the defense or indicates that this man is a liar or perjurer, it is the responsibility of the Government to make that available to the defense whether it is Grand Jury testimony, FBI reports, or anything else, and, as we read Jencks, it is based not only on the supervisory authority of the Supreme Court over the lower Federal courts as far as the rules of evidence are concerned but we read it as enunciating constitutional doctrine under the Fifth and Sixth Amendments, and we think denial of this right on our part to examine this man's Grand Jury testimony before we cross-examine him would be a denial of constitutional rights.

Finally, I do not think you would find, at least I cannot, any witness in my experience in connection with whom this Grand Jury testimony is more pertinent and where it would impose an almost intolerable burden physically and mentally to the defense to require the defense to take him through every item of his testimony in this case and in previous cases and try to drag out from him what he testified to on each of those subjects before each of the Grand Juries and to try to show an inconsistency or contradiction.

On that subject finally Mr. Vincent is wrong, if we get to that point, about our foundation, because Mr. Justice Brennan indicated in the Jencks case that a sufficient foundation is laid if the witness says he doesn't remember as most witnesses will, of course, say. You get very few witnesses who will say, "I told a different story before a Grand Jury than I told in this courtroom," of course. But we will get out of this man, and he has no alternative, because he has given so many inconsistent versions of different incidents and different people for the last eight years in seven proceedings we know about, we will get out of him that he doesn't remember, and I do not think we should [fol. 216] be here for two weeks dragging that out of him before we find out what he testified to under oath and secretly.

The Court: Well, my impression is, as I have just mentioned, I do not believe that the Rosenberg case extends the theory of the Jencks case and the practice that the Jencks case said was proper with respect to statements made by the witness, pre-trial statements to the FBI I think were directly involved in that case, I do not think there was anything in the case to extend the rule of the Jencks case to the testimony before a Grand Jury. To that extent I will agree with this decision from the Third Circuit. I recognize that is a Court of Appeals decision, but I do not think there is anything to warrant the conclusion they reach with respect to the extension of the doctrine of the Jencks case in this particular Grand Jury testimony. So, I do not think we are in any different position with respect to that than we were before the Jencks case or before 3500. I believe everyone concedes it doesn't touch the subject of Grand Jury testimony at all.

Now then, that gets us down to the basic law on the thing, and I do not believe there is any showing here that would justify the production of the Grand Jury testimony. I do not profess to be expert particularly on the matter, but we have had a number of cases around here where there have been requests, but my impression is there is nothing at the moment before the Court anyway that would justify the Court in asking for production of the testimony of the Grand Jury.

Mr. Witt: Just to make our record on it, I have said everything I want to on the other issue—

The Court: Yes.

Mr. Witt: Since your Honor has denied the motion for production of Grand Jury testimony directly to the defense, we move that the Government produce to your Honor for your Honor's examination the Grand Jury testimony of this man, and, if your Honor finds inconsistencies or contradictions between his Grand Jury testimony and his testimony in open court in this case, then, that your Honor turn over that Grand Jury testimony to the defense for further cross examination.

[fol. 217] Mr. Kelley: May I address myself to that, your Honor?

The Court: Yes.

Mr. Kelley: In the first place, the procedure suggested by Mr. Witt is fraught with many difficulties. To begin with, I doubt if this Court has jurisdiction to compel the District Court or the Court of Appeals of the District of Columbia or any other District—

The Court: Let's not get into that. Let's confine it to our own district here.

Mr. Witt: Here at least there is no question he has testified before the Grand Jury on two occasions.

Mr. Kelley: Now, as to the second time he testified that is in a case which is pending on motions before the Court. In the first case it is my position that it is a matter within the discretion of the Court, but in view of all of the prior testimony that this man has given relating to the same, many of the same incidents about which he testified here it would be placing an undue burden on the Court to have to examine and compare that with the testimony on this trial or the testimony on the previous trial, and the man has testified so many times that there just could not be a denial of due process in producing his testimony to see if he left somebody out one time and put him in another time or some little minor immaterial inconsistency which Mr. Witt continues to harp on.

The Court: Well, tell me something factually. I gather from what you say this witness didn't testify before this Grand Jury in connection with this indictment that we are on trial or not?

Mr. Kelley: Yes, he testified in this and in the Pezzati case.

The Court: And the second one was what we call the Pezzati case, the second instance when he testified?

Mr. Kelley: That's right, your Honor.

The Court: Now, I am not sure, as I say, I do not profess [fol. 218] to be an authority on this subject, but I doubt if there has been sufficient showing to justify the production. I would be inclined to overrule the motion on that basis right now with leave to represent if something shows up that does justify it. My impression about those cases in which there has been a production there is some tangible basis, and it is somewhat inconsistent with what the practice is, even the old practice with respect to statements, and I

assume it arises out of the nature of Grand Jury proceedings generally which have a little more veil of secrecy thrown around them than some other transaction.

My memory on those cases where the testimony is produced even for examination by the Court there has to be some rather definite and certain likelihood of material contradiction or something like that to justify its production.

Mr. Witt: I think your Honor is right. I cite the Rosenberg cases. Aside from the Rosenberg cases, those are the cases I mentioned, particularly those in the Second Circuit, what the procedure has been, and that would be our next position which we do not have to make now. The procedure has been, if you show an inconsistency or contradiction, then you can make your request for the Grand Jury testimony, and then it is made available to the Court for inspection first. But we were taking an intermediate position first in view of the nature of the problem of this witness and suggesting that without putting the heavy burden on us of cross-examining him for days as to each of these incidents and each of these names he mentioned that your Honor could examine the Grand Jury testimony now.

The Court: I think I will deny your motion on the basis I have just indicated with leave to represent if the circumstances would be such as to warrant the production, and we will give consideration to it then.

Mr. Witt: So there will be no question in the record, then what we will have to do as we take him on cross examination as to each item of his testimony on direct examination is ask him whether he gave testimony on that matter before a grand jury.

The Court: I would not attempt to prescribe the exact procedure. I think there are a number of cases which point out what happens. My memory is not sufficiently definite to know exactly how the matter arose, whether there had to be an admission that he testified on the sub- [fol. 219] ject to start with and then—well, I don't know, but whatever the general rule is you pursue it. If the facts develop that warrant a consideration of it, I will give it consideration again.

Mr. Kelley: I would like to make this statement again to clear up the record, and that is this: that Mr. Witt's demand for grand jury testimony is to assist him in the cross examination of the witness and it is not for the purpose of assisting in the defense of his client, to prepare his defense.

The Court: I do not quite agree with your area of definition. What I infer—

Mr. Kelley: There are cases that make the distinction.

The Court: To put it another way round he thinks it is for the purpose of impeachment I expect.

Mr. Kelley: He wants it to use for impeachment purposes on cross examination, isn't that right?

The Court: I have overruled the motion, and I want to look up the law if the thing comes up again, because there are a lot of cases on the subject, but I am not sure and I am not saying what the law is. I think some of them have ordered the production where it is for the purpose of impeachment I would say on a very vital question, but somehow the question was developed so you knew what you were looking for when you looked at the testimony. In other words, it is not a general search for inconsistencies. There is something vital in the testimony that is inconsistent not only with the testimony but with the indictment of the defendant or something like that.

Mr. Witt: Mr. Kelley is anticipating, but I think, if we show enough instances of inconsistencies, even though he calls them minor, trivial, I think we are entitled to the production.

The Court: We will pass on it when it comes up.

Mr. Kelley: All I wanted to do was give you a little [fol. 220] memorandum, I think we have a copy to give counsel on this grand jury question.

The Court: I will reserve this, because I have ruled on it, and I might say further, as I said the other day, and I am sure about that short of a natural search, I don't believe this Court has any jurisdiction to tell another District Court in another District to produce the grand jury testimony. In fact, I think the matter was passed on somewhere very recently. I saw a case on it where it was held, and I do not know the level of the holding, that the Court, say, a

District Court in this District had no jurisdiction to compel, say, a District Court in Kansas or somebody else to produce the grand jury testimony. I believe it was a case like that.

Mr. Witt: That may be. But just to keep the record straight it is our position that in order to get grand jury testimony given in another district it would not be necessary for the Court to go to the Court in the other district. We take it for granted that the Department of Justice or its agents have copies of grand jury testimony.

The Court: I don't believe they can produce it without some authority or give it to anybody. I don't know. But we are reserving judgment on that. I just mentioned that. But what I would like to talk about now before we get into any more propositions of law is on this timetable business. I have let this jury wait around an hour or so now. You have to get these reports, and how long is it going to take me to look them over?

Mr. Kelley: I think the judge could look them over in an hour.

Mr. Vincent: No, sir.

Mr. Kelley: Couldn't he?

Mr. Vincent: I don't feel he could. It is possible if he reads very rapidly.

The Court: No. I want to do it in a deliberate manner.

Mr. Vincent: To assimilate them he has a couple of hours of work. That would be my estimate.

[fol. 221] The Court: Even if you get them in the next half hour, I could not get through with them this afternoon, and we were talking about, well, the definite deal was that we would adjourn at noon tomorrow over to Monday, and I am thinking that the thing to do is to get the jury in there, and I think I ought to tell them briefly about this problem here, that I have to look these matters over and so forth and then also tell them about the previous arrangement when we started the trial of the case. I do not think I will mention Mr. Witt's name, but I see no objection to saying that one of counsel since the case was set for trial, had a very important engagement requiring their being in Chicago and that we had a plan and agreed that we would recess in which event we would re-

cess on Thursday at noon and tell them at best we could only get in an hour or two before Thursday noon, and, therefore, we were going to recess until Monday morning. Is that all right to say something like that?

Mr. Witt: Yes.

The Court: Is that all right with you?

Mr. Kelley: Yes, I think probably following our production and after you have examined them and decided what if anything should be excised, then you will advise us and then—

The Court: What I wish you would do on that, you say it will take a half hour or so, you can get them down here yet this afternoon, and I will start working on them this afternoon, and I am going to try, if I possibly can, after I look at them to decide what is to be done before Mr. Witt leaves.

Mr. Witt: May we discuss this problem off the record?

(Discussion off the record.)

In Open Court

The Court: Ladies and gentlemen of the jury, as I think you all understood from the proceedings that we had just before recess, the defense has requested the production of certain statements the witness on the stand has made to agents of the United States Government. The Government has these statements. They are at the moment engaged in getting them arranged, and things of that sort, and as [fol. 222] you heard Mr. Kelley say, it is claimed that the statements contain matter that does not relate to the subject matter of the testimony of the witness on direct examination.

The statute provides, Section 3500, that:

"If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the Court shall order the United States to deliver such statement for the inspection of the Court in camera."

That means for private examination. The Government at the present is presently engaged in assembling these reports and will hand them to the Court for the Court's determination in the first instance with respect to whether or not the testimony or the statements contained in them relate to the subject matter of the testimony of the witness on direct examination. It is perfectly obvious from what I am told that that cannot be completed this afternoon.

Now, it happens that when this case was set for trial, which was last Monday, the date was agreed upon by everyone in view of the fact that witnesses and counsel have come from considerable distance. Shortly after that time another meeting in Chicago was set which requires the presence of one of counsel there Friday and Saturday of this week, so at that time it was agreed by everyone that we would recess on Thursday; that's tomorrow noon, over until Monday. Of course, I think I told you before we do not hold court on Friday, jury trials, because the Court on that day has arraignments set and motions and things of that sort, and our normal week of court for juries is the first four days in the week, so under that previous arrangement we would in due course recess tomorrow at 12:00 o'clock over until Monday.

Now, it is estimated—the Court hasn't seen these reports—but, the Government estimates it will take several hours for the Court to look them over, so that we at the very best would not be able to get in any more than an hour of court tomorrow and would have to recess at 12:00 o'clock to enable counsel to go to Chicago, so I am going to recess now until Monday morning rather than have you come down here for an hour or so tomorrow, and I [fol. 223] trust that next week when the matter proceeds that we can proceed with a fewer number of recesses and with more continuity than we have had in the last day or two. These legal questions, as I say, must be disposed of, and they are inherent to the case, but I think we are getting them cleared up, so from here on we probably will make better time.

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In Chambers

The Court: Was there something else that someone wanted to discuss? I think you had the floor.

Mr. Witt: No, I think we were done.

Mr. Kelley: I think we were; we can get busy on that and try to get those to you.

The Court: We better let the Government get busy and try to get that down here to me in the next half hour or so and I will start working on it. As I say, I intend to take it home and I will let you know, I will call you up and advise you when I want you to come over.

Mr. Witt: On our side will you advise Mr. Deikman?

The Court: Whatever is most convenient; would it be convenient if I just advise Mr. Deikman?

Mr. Deikman: Yes.

Mr. Witt: And you think it should be about 10:00 o'clock?

The Court: That's my hope, and I will try not to make it later than that. I imagine it might be earlier; I imagine I will be calling you sometime between half past 9:00 and 10:00.

The Court: I have gone over the statements that the Government produced pursuant to the motion of the defendant, and I have spent considerable time looking them over. I am satisfied that portion of these statements or records as they have been called must be withheld from the defendant under the provisions of Section 3500, be- [fol. 224] cause they contain no matter that relates to the subject matter of the testimony of the witness, as I see it, his testimony on direct examination.

Now, as I understand the procedure, the matters withheld, of course, are retained, and in the event there is an appeal they are then to be considered by the appellate court. I do not know any way of identifying these or anything else by way of exhibit numbers or anything of that sort. Does anyone have an idea about that?

Mr. Kelley: I think you put them in an envelope and seal them and probably make some notation, something that will show that those were the ones which were not given to the defendant, any record that will indicate that, wouldn't you say so?

The Court: I was just wondering, because they would not be in the nature of an exhibit or anything, but what I have done, for instance, here is one group that is bound together, and my conclusion is that none of this group should be given. I have attached for my own information a memorandum on the front of it to give none of this group, and I think I will put my initials on it and put the date on it. Today is the 16th I think.

I come to the next matter, and I think this one should be given except certain paragraphs that I have indicated on my memorandum that should be stricken out. Before we leave the matter I wish whoever is doing the clerical checking, I wish they would see if it is clear enough to show what portions should be excised.

Mr. Vincent: I think I can do that, your Honor.

The Court: You can see if that is sufficiently clear so you can prepare it. You can look at it. What were you going to say?

Mr. Kelley: It is my understanding too that as to those which are, portions of which are excised that the complete statement will also go in this sealed file which will be part of the record on appeal.

The Court: I assume that's right. I assume what will happen is that you will take these up, eliminate the por-
[fol. 225] tions that I have thought should be withheld from the defendant, and then furnish them with the copies leaving those portions out, but that the original, the whole original document will be in such form that it may be submitted to the Court of Appeals and will be sealed. I think the statute says, "If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge."

So, the entire text would have to be submitted by the Government in accordance with what my views are with respect to the elimination of the part that should be withheld to show the true situation.

Mr. Kelley: Yes, that is my understanding.

The Court: I am assuming you are objecting to withholding any part of the statement.

Mr. Witt: We will make our record as soon as your Honor is finished discussing the statements.

The Court: Now then, the next matter, and I think it is proper to inquire a little about this from both of you, there is a part of the next group or next binding on the statements submitted, there is attached a transcript of the testimony of Mr. Eckert before the CIO Executive Board at Washington which culminated according to the memorandum here in the expulsion of the Mine, Mill & Smelter Workers Union from the CIO. Now, this is a transcript of that testimony. Does that come within the category of statement? It was submitted, as I understand, by Mr. Eckert to the Government.

Mr. Kelley: That is my understanding, your Honor. We had some doubt about it, and because we had the doubt we thought that it should be resolved by your Honor.

The Court: Well, do you have any contention about it? Have you a copy of this?

Mr. Witt: I do not know what it is. If it is what I think [fol. 226] it is, we do have a copy.

The Court: I read it over, and the reason I suspected that you might have a copy. I saw in the course of the proceeding that it was stated by the Chairman, I think that was his title, a gentleman by the name of Potofsky, that the copy was to be made available to the Union, a copy of this transcript, and they were given an opportunity to answer it or something like that, and this is a transcript of Mr. Eckert's testimony before that Committee, and I wondered if there was any other basis for the impropriety of furnishing it. I do not know whether it comes strictly in the category of the statute.

Mr. Kelley: I think, your Honor, that it would be our position that it is not furnishable under the statute. It does not come within the statute, and, we, therefore—

The Court: It is pretty close. I wish you would think it over. I do not want to get any reversible error about the thing in here, because the statute in defining statement it says, "A stenographic, mechanical, electrical, or other re-

cording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." Then, the other part is: "A written statement made by said witness and signed or otherwise adopted or approved by him."

The fact is, as I gather from the submission, this wasn't made to an agent of the Government but it was submitted to an agent of the Government by Mr. Eckert.

Mr. Witt: I take it, your Honor, on that the covering statement though whatever it is you have there must make some reference to it, so, I take it whether the language was used or not that that CIO testimony was incorporated by reference, so that would be part of the witness's statement.

Mr. Vincent: This was a statement actually, your Honor, not made to an agent of the Government.

The Court: I know that, but what I am thinking about, and that is the reason I brought it up, I do not want to get into a question of reversible error here. What the fact is, [fol. 227] as I understand, is that this statement was furnished with the original statement, apparently an original transcript of the testimony was furnished by Mr. Eckert to the FBI, and this is a photostatic copy made by the FBI, all of the statement that he furnished. Now, where he furnishes a statement, a transcript to an agent of the United States of his own testimony it would seem to me to be pretty close to the definition of the statute.

Mr. Kelley: Well, that bothered us when we were reviewing the file, and that is the reason that we did submit it, and, if there is any doubt about it, we would I think in this instance rather err on the side of producing it.

The Court: I think then that they should be given that. There is attached to this actual transcript some other matter that I think should be given with certain eliminations. Now, I have tried with this note on here to indicate what should be eliminated. As I say, I wish you mechanically would look at these and see if they are clear as to what I intend should be eliminated.

Mr. Vincent: Might I just say on the transcript it is on the pure mechanics of reproducing this.

The Court: I do not think you need to reproduce it. The theory of the statute, as I understand it, is that the physical statement itself is given to the defendant unless there is something stricken out or withheld. I mean isn't that the implication of the statute?

Mr. Kelley: You mean rather than a photostatic copy?

The Court: The point I am making, this transcript, I have made no elimination from the transcript, there are some portions that probably do not relate directly or may relate to something foreign to this in a sense, but the whole transcript relates to the very matter that is here under consideration in effect, and the point I am making that you can consider, it is just a mechanical problem, is whether you want to let them have the transcript or you want to make copies of it.

Mr. Vincent: What I had in mind on this, I believe the defense already has a copy of this transcript. If they do [fol. 228] not have a copy of the transcript, we could produce this to the defense, but, if they have a copy, I do not see the necessity of giving them an extra one.

The Court: You can discuss that with Mr. Witt. The only thing that occurs to me under the theory of the statute is that the Court of Appeals, if there is an appeal, if there is a conviction and it is appealed, are entitled to have the matter that was presented to me. In other words, I do not know whether you could avoid it by saying the defense already has a copy of it.

Mr. Witt: We do not know whether it is the same thing especially with a man like this that we distrust so profoundly, so, we would like to have it.

The Court: What you can do is let him have the original transcript or make a copy of it. This is a copy, as a matter of fact. But there is no part of the transcript that I have eliminated or that has been withheld.

Mr. Witt: Your Honor is right, under the statute we are entitled to the originals in the possession of the Government.

The Court: But they do not have the original.

Mr. Witt: Whatever they have, if they have an original copy.

The Court: That is a volunteer statement. That is not any matter I have been furnished. But I have noticed from the mechanical notations that I gathered this was a copy of what he submitted.

Now then, I have next a series of separate sheets I might call them. Some of them I am withholding in their entirety. Others I think should be given. Again, I have tried to attach to the individual pages the part that I think should be eliminated and the part that should be given, and I think you can probably figure it out. I wish you would check them over and let me know. I think that completes the thing.

The next step is to get the copies and give them to the defendant. Do you know how long it will take to get the copies?

[fol. 229] Mr. Kelley: Well, your Honor, I think—

The Court: You after that, you will have to ascertain from the Department whether you are going to furnish them. I expect the record should show that you will be ordered to furnish the defendant the part that I have already given, and, of course, you can withhold the part that I have already withheld, and the reference to the original text you have submitted would show the portions that I think should be given to the defendant and the portions that should be withheld.

Mr. Kelley: Yes. We would like an opportunity to examine that, and then, if there are some areas where we might be in disagreement, we would like an opportunity to express ourselves to you on that point before the final—

The Court: I think you had better look at it first and arrive at what your conclusions are. I wonder in view of the fact that Mr. Witt is leaving at 2:00 o'clock, I wonder, could there be any possibility—how close a connection can you make? If you come down here at 1:00 o'clock, would you still have time?

Mr. Witt: That will be all right.

The Court: You can know by then, can't you?

Mr. Kelley: I think so.

Mr. Witt: I am not sure what you said about 1:00 o'clock, your Honor, but I would want what we are getting by 1:00 o'clock.

The Court: I doubt if they could do that, because I have no idea how rapidly—do you do your own photostatting (sic) up there?

Mr. Kelley: We are going to have it done commercially, and it presents a problem of how this is to be masked and getting those cut out and masking it and getting them photostatted (sic). It will probably, I should think it would take beyond 1:00 o'clock. I am sure it would, because there is a considerable amount.

[fol. 230] The Court: There is no purpose of his coming back unless—except you would know your position about whether you are going ahead and furnish them. I do not know that he needs to come over here.

Mr. Witt: You may let Mr. Deikman know. There will be this other problem.

The Court: The number one thing, as I see it, as I understand the procedure, is for the Government to look at these texts they have submitted and my notations on them and first decide whether they are going to furnish the part that I have already given. If they decide to do that, next is the mechanics of getting copies made.

Mr. Witt: When will we be able to come back after the prosecution has been able to look them over and see what your Honor has done?

The Court: They will know that by 1:00 o'clock. There won't be any copies, but I do not know that you need to come over. They can let you know by telephone although I think we ought to have the record straight on the thing.

Mr. Witt: I should think we all want to be together again.

The Court: You can tell whether you are going to furnish them by 1:00 o'clock?

Mr. Kelley: What we could do, as you know, there are quite a few of them to read. It won't take us as long to check as it took you to read the entire statements, but what we will do is do it with all the dispatch at our command, and as soon as we know we will contact Mr. Deikman. It seems to me, if we are in complete accord with what the Court has indicated should be eliminated, that we should then proceed to have them photostated.

The Court: I think we ought to have it in the record though that subdivision (d) says, "If the United States elects not to comply with an order of the court under paragraphs (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony [fol. 231] of the witness," and so forth. That is only part of the Section.

I think some place along the line you should say you are going to furnish it or not going to furnish it for the record rather than a telephone conversation. I believe you could tell by that time, it would not take but a few minutes, because we would all understand you would not have the copy, if you think you can do it by that time.

Mr. Kelley: I hesitate to say, because we will call Washington immediately as soon as we have had an opportunity to review them.

The Court: Let's leave it this way then: You will proceed as rapidly as you can and by 12:30 or something like that we will let them know if they are going to come over at 1:00. If you cannot, of course, we will have to have Mr. Deikman come over if it is after Mr. Witt leaves.

Mr. Witt: There is a problem there. On our side it happens I am handling this problem and not Mr. Deikman particularly because it is I, as I have indicated, who will cross-examine the witness and who has cross-examined him before and is familiar with his story, so that I would want to be here if there is any question.

The Court: What would be the absolute deadline?

Mr. Witt: My plane leaves at 2:20 this afternoon.

The Court: You would have to leave here at 1:30 and pick up your stuff?

Mr. Witt: May we go off the record for a minute?

The Court: Yes.

(Discussion off the record.)

The Court: I wish you would see if you cannot get this information within the deadline, and you can advise me and advise them as soon as you know.

Mr. Kelley: All right, we will do it as fast as we can.

[fol. 232] Mr. Witt: Why don't we agree to be back here at 1:00 in any event?

The Court: Yes. That may simplify it. If they are not ready, you can go on your way, and, if they are, that is all right, and that will save telephoning.

Mr. Kelley: Whatever state we are in at that time we will notify the Court.

The Court: I think that is better rather than the other way. I think this is also proper, when they commence to give study to my memo there, if you cannot figure out what really should be stricken—I think it is perfectly clear—but if there is any question about that, I think it proper that you can come down and see me, and I will point out what I had in mind. I didn't want to make any marks, and there are no marks whatsoever on the statement. I tried to put a note on them saying "Strike second paragraph," and all of that. If you have any difficulty, you may come down.

Mr. Vincent: So far as I can see your writing is clear.

Mr. Witt: Whenever you are ready I want to make a record on this issue.

The Court: Do you want to do it now? I do not know, of course, what you have in mind. What I am thinking is perhaps, maybe we had better do that in light of the fact they are going to have to find out about the Washington business, if your record could wait until they know what they are going to do—

Mr. Witt: I would rather make it now, your Honor, because, if we get together at 1:00 o'clock, there will be too much pressure, and I do not see why we cannot make our record now.

The Court: Proceed.

Mr. Witt: If your Honor please, in order to help us make our record we would like to ask your Honor what definition your Honor gave the phrase "subject matter" in the statute when your Honor reviewed the statements to distinguish them.

[fol. 233] The Court: I do not think the statute contemplates that the Court do that at all. As I understand the procedure, my duty is simply to say what portions might be withheld and what portions should be given to you and

that I, if I made a mistake on that, the question can be presented to the Court of Appeals in the event of a conviction, because I do not see how the matter could be discussed without to some degree at least explaining what the matter was that was eliminated and the reasons for it which would be equivalent in effect to detailing the whole report itself. So, I do not believe the Court is required to make any statement along that line.

Mr. Witt: All right. We take a contrary view to that from the constitutional point of view. All I wanted was to get your views on it, and we wanted to state our position on the record.

The Court: Very well.

Mr. Witt: The fact that neither the statute nor your Honor defines "subject matter" and in light of the fact that we, the defense, do not get to see the statements at the same time as your Honor does and do not have any opporunity to express our views as to the definition of "subject matter" and therefore as to what is relevant and as to what is irrelevant in the statements it is our position that we are being denied due process and the right to a fair trial under the Constitution.

I may as well complete my statement on the issues if your Honor has no objection.

The Court: No, proceed.

Mr. Witt: Beyond that, if Section 3500 authorizes the procedure that your Honor is following, apart from whether your Honor defines the phrase "subject matter" Section 3500 denies due process and a fair trial. Beyond that, if we are wrong in that, your Honor, in view of the fact that the defendant was indicted in 1954 and the indictment was pending in September, 1957, when this statute was passed the statute even if it is interpreted contrary to the position I have just stated, it is inapplicable to this defendant whose indictment was pending at the time the statute was passed. [fol. 234] The Court: Well, that objection will be overruled and, of course, in making the direction that the Court has pronounced here this morning with respect to the matter I was guided by the criterion of the statute which reads, "Upon such delivery the Court shall excise the portions of such statement which do not relate to the subject matter

of the testimony of the witness." That was the guide the Court followed in ruling as it did.

Mr. Witt: We have one other point entirely unrelated to this before we break up. Your Honor, you remember some of the testimony of the witness Eckert was admitted subject to connection. We didn't get yesterday's transcript by some error until this morning, so, we haven't had a chance to study it. So, we would like to reserve our motion to strike until Monday.

The Court: You can do that. As a matter of fact, I think from the very nature of the thing that that means really at the end of the Government's case in effect. You can reserve it until then, because it doesn't connect it up by his testimony. It would take other witnesses.

Mr. Witt: I didn't make myself clear. There is some material of that kind that the Government said it will connect up with other witnesses, but apart from testimony of that kind there is other testimony which the Government indicated it would connect to the testimony of the witness Eckert, himself, before he was finished, and we want to move to strike those parts before we begin our cross examination.

The Court: Well, all right, that will be all right.

Mr. Witt: Your Honor, we haven't had an opportunity to study yesterday's transcript thoroughly, but there may be one other matter relating to the discussion in Chambers about Section 3500 that we may want to come back to Monday, because we have the feeling that the record is either incomplete or embodies a misunderstanding, and we would like to come back to that also before we pick up our cross examination.

The Court: All right, I think that is all right.

The Court: Mr. Kelley, has the Government decided whether they will comply with the order of the Court, or what is the Government's position?

[fol. 235] Mr. Kelley: Your Honor, we have gone over the notations which you have made on the material which was submitted to you by the Government, and it is the decision of the Government to comply with the Court's interpretation at this time although we have some minor disagreements with the Court as to some portions, and I men-

tion this for the reason that we may with reference to future statements wish to, we will discuss it further or have the Court consider those matters.

The Court: You mean with respect to some future record?

Mr. Kelley: Some future record. In other words, we do not want to bind ourselves to the position we are taking now.

The Court: All we are passing on now is the question of furnishing the reports with respect to the witness Eckert. As I understand, you will comply with that and furnish them in compliance with the Court's order?

Mr. Kelley: Yes.

Mr. Witt: It is important for me to say from our side, your Honor, at this point that what Mr. Kelley has now said highlights the unfairness in this procedure. The defense doesn't have the slightest idea as to what the Court and the prosecution is talking about, and—

The Court: I am not in much better light than you are.

Mr. Witt: Except in one sense it doesn't matter. Mr. Kelley is talking about an issue, a very crucial issue in this case which we know nothing about. We have no time to consider, no opportunity to consider, no material to consider. The prosecution has an enormous advantage over us in that respect which is unfair and which denies us due process and an unfair trial.

The Court: As I understand, what Mr. Kelley said, and my impression is a little different than yours, is that in effect he is not in entire accord with the Court's view on the matter but notwithstanding that he is furnishing it, but he doesn't want to establish a precedent, so, if other statements are requested subsequently in the trial, that his acquiescence in furnishing these would be taken as any basis for his acquiescence in the others. In other words, as I [fol. 236] think should be done, and I think that is the Court's position, each one of these is going to be decided on the actual facts pertaining to them.

Mr. Witt: It is still our position that we are entitled to see all these reports in toto as long as they contain any material bearing on the subject matter of the witness's testimony.

The Court: I understand your position, and I think we have been over that. What was the motion? Was there any motion you made for me to rule on?

Mr. Witt: No. We made an objection. So, I want to renew it so there will be no doubt on the record on it.

* * * * * * *

[fol. 248] In Open Court

KENNETH ECKERT, resumed the stand, and testified as follows:

Cross examination.

By Mr. Witt:

Q. Mr. Eckert, you have testified before with respect to Mr. Travis and Mine-Mill, haven't you?

A. Yes.

Q. Would you tell us what those occasions have been if [fol. 249] there has been more than one occasion?

A. Is that Travis and Mine-Mill or just Mr. Travis?

Q. Travis and Mine-Mill.

A. Well, I have testified in proceedings involving the Mine, Mill & Smelter Workers in the trial of Mine, Mill & Smelters Workers by the CIO, in the Senate, United States Senate investigation of Mine, Mill & Smelter Workers, The McCarran hearing in Salt Lake City, the Jencks case in El Paso, Texas, Grand Jury of Ben Gold, and the subsequent trial of Ben Gold, the Grand Jury proceedings involving Maurice Travis in Denver, and the trial of Maurice Travis, the decompliance proceedings of the National Labor Relations Board against the Mine, Mill & Smelter Workers, the Security Activities Control Board hearings on Mine, Mill & Smelter Workers.

Q. You say the Securities Activities Control Board. You mean the Subversive Activities Control Board, don't you?

A. I believe that's correct, yes. These are the ones that I recall at the moment.

Q. Did you give testimony about Travis before a second Grand Jury in Denver at any time?

Mr. Kelley: Just a moment. The Government objects to that as being immaterial and not proper cross examination.

The Court: I think he can answer the question. You may answer, Mr. Eckert.

A. I don't recall any other Grand Jury proceedings involving Travis here.

Q. Well, Mr. Eckert, you stated that you testified about Travis before one Grand Jury in Denver. Can you remember when that was?

A. To the best of my recollection that was either the last part of 1954 or early 1955.

Q. Didn't you return to Denver subsequently to make another appearance before another Grand Jury in the Federal District Court?

A. I don't recall any other Grand Jury proceedings in Denver other than that one.

Mr. Witt: I am sorry, your Honor. This answer surprises me a little. All right, I think I can go forward while Mr. Deikman is checking that.

The Court: You may proceed.

[fol. 250] Q. Mr. Eckert, did you testify before a Grand Jury in El Paso before Jencks was indicted?

A. To the best of my recollection I don't think I testified before a Grand Jury there.

Q. Mr. Eckert, were you interviewed by an Agent or Agents of the FBI about the question of testifying against Jencks before a Grand Jury in El Paso?

A. I don't recall any such interview.

Q. Now, aside from giving testimony in the proceedings you have mentioned and in this case about Travis and Mine-Mill have you testified for the Government in any other case?

A. Yes.

Q. One case or more than one other case?

A. Well, I recall one case.

Q. What case was that?

A. The Smith Act case in Philadelphia. Oh, yes, the Ben Gold trial in Washington. I believe I mentioned that.

Q. I think you did. Any others?

A. I don't think there were any others.

Q. Did you testify before the Grand Jury in Philadelphia which handed down that Smith Act indictment?

A. To the best of my recollection I did not.

Q. And in testifying in that Smith Act case in Philadelphia did you have occasion to give any testimony about Travis?

A. I don't think there was any testimony about Travis insofar as I can recall.

Q. Or about Mine-Mill?

A. Well, it is entirely possible in mentioning Mine-Mill that I testified I was employed by him, but I don't recall.

Q. You don't recall giving any testimony about Mine-Mill, that is, in the Philadelphia Smith Act case?

A. I don't recall the testimony, the questions asked of me there.

Q. Now, going back to these proceedings you have mentioned, Mr. Eckert, I will try to take them in order and ask you to give us the dates when you testified as best you can recollect. I am not asking you for the exact dates. Give the exact dates if you recall. Otherwise, give us the year and the month if you recall. Beginning with your testimony before the CIO when did you give that testimony?

A. That was in 1950. I don't recall the time.

Q. Would it have been in January of 1950?

A. I don't recall.

Q. You mentioned the McCarran Committee hearings in Salt Lake City. Do you remember when you gave that testimony?

[fol. 251] A. That was in 1952. To the best of my recollection it was sometime in the fall.

Q. When did you testify on the Jencks trial?

A. To the best of my recollection the Jencks trial was in January of 1954.

Q. When did you testify before the Grand Jury in the Gold case?

A. I believe the testimony to the Grand Jury in the Gold case was in 1953.

Q. Incidentally, where did you give your testimony before the CIO, what city?

A. Washington, D.C.

Q. And what city—I think you already stated but I am not sure—in what city did you give your testimony before the McCarran Committee?

A. Salt Lake City, Utah.

Q. In what city did you give your testimony against Jencks?

A. El Paso, Texas.

Q. In what city did you testify before the Gold Grand Jury?

A. Washington, D.C.

Q. And subsequent to your testimony before the Grand Jury in Gold you testified on the Gold trial. Do you recall when that was?

A. That was in 1954 in Washington.

Q. Do you remember the month?

A. No, I don't.

Q. Then, you mentioned the proceeding before the NLRB. In what city was that?

A. Washington, D.C.

Q. Do you recall when that was?

A. In 1954.

Q. Do you recall the month?

A. I don't recall the month.

Q. You have already testified that you gave testimony before the Grand Jury in this court which indicted Travis. Do you recall when that was?

A. To the best of my recollection that was either the latter part of 1954 or early in 1955.

Q. Do you recall when it was that you testified before the SACB, being the initials of the Subversive Activities Control Board?

A. Yes.

Q. When was that?

A. That was in March of last year.

Q. That is, '57?

A. Yes.

Q. Did your testimony last into April, do you recall?

A. Yes, it did.

Q. And where was that, Mr. Eckert?

A. In Washington, D.C.

Q. All right, Mr. Eckert, I will ask you whether you had

any talk or discussions or interviews with the FBI, any Agent or Agents of the FBI during the period while you were still with the Mine, Mill & Smelter Workers.

A. No, I did not have.

Q. Mr. Eckert, I will ask you whether at any time when you were with the Mine, Mill & Smelter Workers you were [fol. 252] aproached by the FBI for the purpose of talking to them about Travis or the Mine, Mill & Smelter Workers.

Mr. Kelley: If the Court please, the Government objects to that as being immaterial and irrelevant, improper cross examination.

The Court: The objection will be overruled.

Mr. Kelley: May I approach the Bench, your Honor?

The Court: Yes.

(Conference at the Bench.)

In Open Court

The Court: Will you please read the last two questions and answer?

(The reporter read the last two questions and answer, as follows: "Question: All right, Mr. Eckert, I will ask you whether you had any talk or discussions or interviews with the FBI, any Agent or Agents of the FBI during the period while you were still with the Mine, Mill & Smelter Workers. Answer: No, I did not have. Question: Mr. Eckert, I will ask you whether at any time when you were with the Mine, Mill & Smelter Workers you were approached by the FBI.")

The Court: I think I will sustain the objection to the last question. I think the subject in this is covered by the previous question and answer.

Mr. Witt: I do not want to disregard your Honor's ruling. May I try another question in the same direction?

The Court: All right.

Q. Mr. Eckert, at any time before you left the Mine, Mill & Smelter Workers in 1948 did you refuse to talk to the FBI about Travis or the Mine, Mill & Smelter Workers?

Mr. Kelley: Same objection. The question has already been asked and answered.

[fol. 253] The Court: I think I will sustain the objection. The answer was given in the other answer.

Q. Mr. Eckert, did there come a time when you did talk to the FBI about Travis or Mine-Mill?

A. Yes.

Q. And when was the first time that you gave the FBI any information about Travis or Mine-Mill?

A. Well, it was sometime after I left the Mine, Mill & Smelter Workers to the best of my recollection. It was sometime in that year 1948.

Q. Do you recall what month during the year 1948 that was?

A. No, I do not.

Q. Do you recall answering a question about that when you gave testimony in another proceeding?

A. I don't recall the questions asked in those proceedings, no.

Q. I didn't ask you whether you recall the questions, Mr. Eckert. I asked you about this particular question, whether you recall being asked a question about this when you gave testimony in one of these other proceedings.

The Court: You will have to specify the time and place instead of asking him a general question. Ask him if such and such a time and then read the question to him and read the answer to that question that was propounded, the question propounded and the answer given.

Mr. Witt: All right, sir. Before I do that I would like to ask another question.

Q. You said it was sometime during the year 1948 after you left Mine-Mill. When was it again that you left Mine-Mill, Mr. Eckert?

A. We seceded in June of 1948 as far as I can recall.

Q. All right, now; do you recall whether it was within the next month or two or three months after June that you talked to the FBI or whether it was during the latter part of the year?

A. I don't recall when it was, no.

Q. Do you recall being cross-examined by me on this subject when you testified before the SACB in March of 1957?

A. I recall being cross-examined by you.

Mr. Witt: I move to strike that answer. Of course, the witness recalls being cross-examined by me. I want a responsive answer to my question.

[fol. 254] The Court: That was the answer. I thought it was responsive.

Mr. Witt: I asked him about being cross-examined on this question, not whether he was cross-examined by me.

The Court: No, he doesn't have to answer that question. He simply answered that he recalled being cross-examined by you. If there is any question you wish to call his attention to, you have to do it specifically and ask him if the following question was propounded and if he gave the following answer.

Mr. Witt: I am laying my foundation. In any event his answer that he was cross-examined by me is not responsive, and I move to strike it.

The Court: No, the answer will stand. I think it was responsive. He said he remembered being cross-examined by you.

Mr. Witt: That wasn't the question, your Honor. The question was whether he remembered being cross-examined by me about when it was he talked to the FBI after he left Mine-Mill.

The Court: No, the objection will be overruled, and the answer will stand, and you can frame your question along the line I indicated, because the witness asked to have his attention called to the specific question, not the general subject.

Mr. Witt: All right, your Honor. It is my understanding that I have to lay a foundation first, but, if your Honor sees it that way, I will proceed the other way.

The Court: If he says he did, you will have a problem of identifying the record.

Mr. Witt: I would just as soon proceed that way, because it is a nuisance to have these marked.

Mr. Kelley: I think as to this particular type of document that we would agree to that procedure.

The Court: All right, you can ask him if he, at that time the question was propounded and the answer was given as follows.

[fol. 255] Q. Mr. Eckert, do you recall that when you testified before the SACB in March of 1957 I asked you the following question and you gave the following answer: "Question: Approximately when in 1948 did you first talk to the FBI? Answer: Shortly after seceding from Mine, Mill & Smelter Workers."

A. I recall questions of a general nature and an answer that is along that line. That refreshes my memory. I don't know if it is the exact words or not.

Q. Now having heard the answer that you gave before the SACB on that occasion, Mr. Eckert, I will ask you whether you would say now that you talked to the FBI first shortly after you seceded from Mine-Mill.

A. Yes, I think it was shortly after.

Q. Now, in view of that can you tell us now according to your best recollection when shortly after it was, whether it was July or August or whether it was November or December of '48?

A. Well, by shortly after I meant five, six, nine months, less than a year, I know that.

Q. On that occasion, Mr. Eckert, did you go to the FBI to talk to them about Travis and Mine-Mill or were you approached by the FBI to talk to them about Travis and Mine-Mill?

Mr. Vincent: We object to that. We see no materiality in that question.

The Court: No, the objection will be overruled. He can answer the question.

A. The FBI then came to see me. When they inquired about Travis I don't recall.

Q. I didn't ask you that, Mr. Travis.

Mr. Witt: Your Honor, I move to strike that statement of the witness when they inquired. The question is whether he went to the FBI voluntarily or whether the FBI came to him on that occasion.

The Court: Well, he has answered the question, and the motion to strike will be denied.

Q. Answer the question, Mr. Eckert.

The Court: Well, he has answered.

[fol. 256] Mr. Witt: May I have the answer read back, please?

(The reporter read, as follows: "Question: On that occasion, Mr. Eckert, did you go to the FBI to talk to them about Travis and Mine-Mill or were you approached by the FBI to talk to them about Travis and Mine-Mill? Answer: The FBI then came to see me. When they inquired about Travis I don't recall.")

Q. Then, Mr. Eckert, if I understand your answer, your testimony is that on the first occasion when you talked to the FBI they came to see you, is that right?

A. Yes.

Q. Did you talk to them about Travis on that occasion?

A. I don't recall.

Q. Did you talk to them about Mine-Mill on that occasion?

Mr. Crandall: I object to that. I think we are interjecting Mine-Mill here.

The Court: The objection will be overruled.

A. I don't recall.

Q. Do you recall where that talk took place, Mr. Eckert?

A. In Cleveland, Ohio.

Q. Did it take place in your office or in the office of the FBI in Cleveland?

A. It was not in the FBI office. To the best of my recollection it was in my office.

Q. Where was your office at that time, the address in Cleveland, Mr. Eckert?

A. I don't recall which office. There were two of them at that time. I am not able to establish the location of the office at that particular time.

Q. Mr. Eckert, after you left Mine-Mill did you have any trade union connection?

A. Yes.

Q. And what was that?

A. The National Association of Die Casting Workers.

Q. And thereafter you became affiliated with the United Auto Workers, is that right?

A. Yes.

Q. When was it that you became affiliated with the United Automobile Workers?

A. Sometime in 1948.

Q. Do you remember when in 1948?

A. Well, late in the fall to the best of my recollection.

Q. Now, do you recall on this occasion when the FBI talked to you in your office whether you were still affiliated with the National Association of Die Casting Workers, or were you already affiliated with the UAW?

A. With the UAW.

[fol. 257] Q. Mr. Eckert, do you recall whether on that occasion you talked to the FBI about anything related to the subject matter of your direct testimony on the witness stand in this trial?

Mr. Kelley: The Government objects to that as already having been asked and answered.

The Court: I don't know that it is on that basis.

Mr. Kelley: He has stated that he didn't know when he first mentioned Mine-Mill or Mr. Travis. It has been asked two or three times in different ways.

The Court: I think probably the question is subject to possibly some matter of construction; you have asked him if he talked to them about anything he discussed in his direct examination or covered in the direct examination. There might be a difference of opinion about that. I think you better ask him about specific matters. I think I will sustain the objection to the question on the ground it is too general.

Mr. Witt: I want to shorten it, Your Honor. That kind of examination will make the cross examination fairly lengthy. I will be glad to do it; in fact, I would prefer it that way.

The Court: I think you better identify the subject matter you have in mind. I think you can do that generally rather than putting it within the scope of the direct testimony.

Q. Mr. Eckert, on that occasion—you know the occasion I am talking about—the first time you talked to the FBI

in your office in Cleveland—on that occasion did you tell the FBI anything about your own history in the Communist Party?

A. My history in the Communist Party? I don't understand the question, Your Honor.

Q. Do you have trouble with the word "history," Mr. Eckert?

Mr. Kelley: The Government objects to that.

Q. Did you study that when you went to school?

The Court: The witness said he didn't understand the question.

[fol. 258] Mr. Witt: All right, I will rephrase it if the witness has difficulty with the word "history."

Mr. Kelley: The Government objects to counsel's appraisal of the witness' understanding of or his characterization of it and move that it be stricken.

The Court: The witness said he didn't understand the question and counsel can proceed with another question if he wishes.

By Mr. Witt:

Q. Mr. Eckert, on that occasion did you talk to the FBI about your experiences in the Communist Party?

A. I don't recall that I discussed with the FBI on that occasion.

Q. Do you recall whether on that occasion you told the FBI that you had been a member of the Communist Party?

A. I don't recall what the subject was.

Q. Do you recall whether on that occasion, Mr. Eckert, you talked to the FBI about the so-called Steering Committee in Mine-Mill?

A. I don't recall what I discussed with them.

Q. So do your answers mean, Mr. Eckert, that no matter what subject I would ask you about in connection with your direct examination you would say you don't recall?

Mr. Kelley: The Government objects to that as an improper question and argumentative.

The Court: I will sustain the objection.

Q. Mr. Eckert, on that occasion when you talked to the FBI did you talk to them about the Mine-Mill convention in St. Paul in 1947?

Mr. Kelley: May it please the Court, the witness has already been asked this question and answered it, and to dwell on this one initial contact with the FBI, it seems to me, is improper cross examination.

The Court: I think he may answer the question. Of course, he has stated that he didn't recall the subject of the conversation, but there may be something in the question that suggests something to the witness' mind, so he may answer the question. You can read the question to him again, please.

[fol. 259] (The last question was read by the reporter.)

A. I don't recall.

By Mr. Witt:

Q. Did you talk to them about the Mine-Mill convention in Cleveland in 1946?

A. I don't recall.

Q. Did you talk to the FBI on that occasion about John Williamson?

A. I don't recall.

Q. Do you recall whether on that occasion you told the FBI whether or not you even knew Travis?

A. I don't recall.

Q. Do you recall whether on that occasion you talked to the FBI about Harold Sanderson?

A. I don't recall.

Q. Graham Dolan?

A. I don't recall.

Q. Chase Powers?

A. I don't recall.

Q. Al Skinner?

A. I do not recall.

Q. Gil Green?

A. I do not recall.

Q. Fred Fine?

A. I do not recall.

Q. Joseph Stalin?
A. I do not recall.
Q. William Z. Foster?
A. I don't recall.
Q. Eugene Dennis?
A. I don't recall.
Q. Ken Eckert?
A. I don't recall the subject of the conversation.
Q. Do you recall giving them your name?
A. I don't recall what I said to the FBI.
Q. Do you recall whether on that occasion you talked to the FBI about the meeting at the Russian Cooperative Restaurant in Chicago in 1946 about which you testified here on direct examination?
A. I don't recall.
Q. Did you talk to the FBI on that occasion about Henry Horowitz?
A. I don't recall.
Q. About Clinton Jencks?
A. I don't recall.
Q. About Jack Marcotti?
A. I don't recall.
Q. About Jack Clark?
A. I don't recall.
Q. About Orville Larson?
A. I don't recall.
Q. About Bill Haywood?
A. I don't recall.
Q. Was there only one agent on that occasion or more than one?

Mr. Kelley: The Government objects to that as being immaterial.

The Court: The objection will be overruled.

A. My recollection is that there were two.
Q. Do you recall their names?
A. Yes.

[fol. 260] Mr. Kelley: May it please the Court, the Government objects to that and wishes to approach the bench.

The Court: For what reason? You might as well state it for the record.

Mr. Kelley: Who the FBI agents were is immaterial to the proceedings here. He hasn't testified on direct examination as to any FBI agents. He stated the number. As far as testing his recollection, that seems to me is as far as we need proceed on that ground. There is no indication that the Government has any intention of calling them as witnesses, nor that the defense has.

The Court: The objection will be overruled and he may answer the question.

A. The one agent's name was Dave Wible. I don't recall definitely whether the other agent was Mr. Fernandez or not.

By Mr. Witt:

Q. There were subsequent occasions when you did talk to Agent Fernandez, weren't there?

A. I have a recollection at least on one occasion of having met and having talked to an agent. It seems to me that his name was Fernandez, something like that, pretty close.

Q. Do you recall his first name?

A. No, I do not.

Q. About how long did that conversation last, Mr. Eckert?

A. I really don't remember.

The Court: Are you talking about this first conversation?

Mr. Witt: Yes, we are still talking about that. I think the witness understood.

Q. You understand I was still talking about this one?

A. Yes.

The Court: You asked him about another conversation with Mr. Fernandez.

Q. I think the witness understood. Just so there will be no doubt in the record I am asking you about this first conversation in your office in Cleveland, whether you recall how long it lasted?

A. I do not recall.

[fol. 261] Q. Now, did there come a second occasion when you talked to the FBI, Mr. Eckert?

A. Yes.

Q. And do you recall when that was?

A. No, I do not.

Q. Do you recall in what city it took place?

A. Cleveland, Ohio.

Q. Do you recall how long after the first occasion this took place?

A. Well, it was less than a year; I don't recall how long, though.

Q. And do you recall where in Cleveland that conversation took place?

A. No, I don't.

Q. Was there only one agent on that occasion or were there more?

A. I don't recall.

Q. Do you recall the name of the one agent or the names of any of the agents?

A. Well, to the best of my recollection there was Mr. Wible.

Q. But, you don't recall whether any other agents were there in addition to Mr. Wible?

A. No, I don't recall.

Q. Do you recall whether at that time you were still affiliated with the National Association of Die Casting Workers?

A. Yes, I recall.

Q. Were you?

A. No.

Q. Were you then affiliated with the UAW?

A. The National Die Casting Association was affiliated with the UAW in that sense.

Q. I am asking you to make a distinction between the two periods, one before the National Association of Die Casting Workers became affiliated with the UAW, and two, after that, so I will ask you again so there will be no doubt in the record about it, and your answers: I ask you whether you recall whether this second occasion took place before the National Association of Die Casting Workers became affiliated with the UAW?

A. No, after.

Q. Your answer is it took place after the affiliation with the UAW, is that right?

A. Yes.

Q. When did the affiliation take place, the affiliation of the National Association of Die Casting Workers with the UAW?

A. 1948.

Q. When in 1948?

A. I don't recall the month, the latter part of the year.

Q. When you say the latter part of the year you mean sometime after August or after September or after October?

A. Well, it was after August; I don't recall when the merger actually took place. To the best of my recollection it was after August.

[fol. 262] Q. All right, Mr. Eckert, getting back to this conversation with Mr. Wible, on that occasion did you talk to Mr. Wible about Travis or Mine-Mill?

Mr. Kelley: Now, is counsel referring to the second time?

Q. Yes, I am referring, Mr. Eckert, to the second time when you talked to the FBI, specifically to Mr. Wible, or Special Agent Wible.

A. I don't recall what the conversation was or whether it was in regard to Mine-Mill or Mr. Travis.

Q. Do you recall whether on that occasion—in the series of questions, Mr. Eckert, I will be referring to the second occasion—do you recall whether on that occasion you told Mr. Wible about your own experiences in the Communist Party?

A. No, I do not recall.

Q. Do you recall whether on that occasion that, Mr. Eckert, you talked to Mr. Wible about the so-called Steering Committee in Mine-Mill?

A. No, I do not recall.

Q. Do you recall whether on that occasion you talked to Mr. Wible about Chase Powers?

A. No, I do not recall.

Q. About Al Skinner?

A. I don't recall.

Q. About William Z. Foster?

A. No.
Q. About Eugene Dennis?
A. No.
Q. John Williamson?
A. No.
Q. Gil Green?
A. No.
Q. Fred Fine?
A. No.
Q. Arnold Johnson?
A. No.
Q. On that occasion did you talk to Mr. Wible about this meeting in New York early in '48 with Mr. Travis and leaders of the Communist Party which you testified about on direct examination?
A. I don't recall.
Q. On that occasion did you talk to Mr. Wible about the meeting at the Russian Cooperative Restaurant in Chicago in 1946 about which you testified on direct examination?
A. I don't recall.
Q. On that occasion did you talk to Mr. Wible about Graham Dolan?
A. I don't recall.
Q. About Harold Sanderson?
A. I don't recall.
Q. About Jack Marcotti?
A. I don't recall.
Q. About Jack Clark?
A. I don't recall.
Q. About Orville Larson?
A. I don't recall.
Q. Did you give Mr. Wible your name on this second occasion, Mr. Eckert?
A. If he asked me I gave it to him; I don't recall whether he asked me or not.
[fol. 263] Q. On that occasion, Mr. Eckert, did you tell Mr. Wible why you were no longer associated with the Mine-Mill & Smelter Workers?
A. I don't recall what I told Mr. Wible.
Q. On that occasion did you tell Mr. Wible that you had been expelled from the Communist Party?

A. I don't recall.

Q. On that occasion did you tell Mr. Wible that the rule in the Communist Party was that a member couldn't resign?

A. I don't recall.

Q. All right, Mr. Eckert, I will ask you whether there came a third occasion on which you talked to the FBI or any agent or agents of the FBI?

A. Yes.

Q. And do you recall when that took place?

A. No, I do not.

Q. Do you recall in what city it took place?

A. Yes.

Q. What city?

A. Cleveland.

Q. Do you recall where in Cleveland?

A. No, I don't.

Q. Was there only one agent on that occasion, or were there more?

A. I don't recall.

Q. There was at least one agent?

A. Yes.

Q. And was that Mr. Wible again?

A. To the best of my recollection it was Mr. Wible.

Q. What was Mr. Wible's full name, Mr. Eckert?

A. My recollection is that his name was Dave Wible.

Q. Did there come a time when you called him by his first name?

Mr. Kelley: The Government objects to that as being immaterial, irrelevant.

The Court: I will overrule the objection.

A. Yes, I believe so.

Q. And there came a time when Dave Wible called you Ken?

A. I believe that's correct.

Q. You got to know Mr. Wible pretty well after awhile, didn't you, Mr. Eckert?

A. I don't think you ever get to know an FBI man very well.

Mr. Witt: I move to strike that, if the Court please.

Mr. Kelley: I think the whole line of questioning is improper, and it is in the nature of an argumentative line of questioning.

[fol. 264] The Court: Are you going to object?

Mr. Witt: I object to this procedure.

The Court: You have a motion to strike—

Mr. Witt: I have a motion to strike pending. I don't want Mr. Kelley to interfere with the procedure I am pursuing. After Your Honor acts on that Mr. Kelley can make his objection.

Mr. Kelley: I think the answer that he gave was in response to the question he asked.

The Court: The answer will stand; the motion to strike will be denied.

Q. Can you tell us how many times all together you talked to Dave Wible about Travis or Mine-Mill from the time that you first met Mr. Wible until you took the witness stand in this trial?

A. No, I don't recall.

Q. Would you be able to make an estimate?

A. No, I would not attempt to guess.

Q. Why do you have difficulty, Mr. Eckert, because there were so many occasions that you can't estimate?

A. No, I don't think so.

Q. Can you explain why you have difficulty answering a question of that kind?

A. Well, you asked me first of all if Mr. Wible—there were other agents I talked to, I don't recall how many, so I just don't want to guess at it.

Q. I didn't ask you about other agents. My question now is, Mr. Eckert, whether you can tell the ladies and gentlemen on this jury and the Court how many times you talked to Mr. Wible about Travis and Mine-Mill from the time you first met him until you took the witness stand in this proceeding.

A. Well, I understood your question to be why I couldn't estimate the number.

Q. Well, is your answer—

A. I don't remember how many times there were.

Q. And I will ask you again whether you can estimate how many times there were.

Mr. Kelley: The Government objects to this.

The Court: I think this is getting into the argumentative [fol. 265] stage. I think I will sustain the objection.

By Mr. Witt:

Q. Now, Mr. Eckert, on this third occasion that Mr. Wible talked to you—I think you said you don't remember when that was, is that right?

A. Yes.

Q. Can you estimate the time with reference as to how long after the second occasion it took place?

A. I don't remember when that may have been.

Q. Now, on this third occasion do you remember whether you talked to Mr. Wible about Travis or Mine-Mill?

A. I don't recall the subject of the discussion.

Q. On this third occasion did you talk to Mr. Wible about your own experiences in the Communist Party?

A. I don't recall.

Q. On this third occasion did you tell Mr. Wible that a member of the Communist Party couldn't resign from the Communist Party?

A. I don't remember the subject of discussion with Mr. Wible at that time.

Q. Do you recall whether on that occasion you told Mr. Wible that you had been expelled from the Communist Party?

A. I don't recall.

Q. Do you recall whether on that occasion you talked to Mr. Wible about Chase Powers?

A. I don't recall.

Q. Al Skinner?

A. Is the question do I recall?

Q. Do you recall whether on this third occasion you talked to Mr. Wible about Al Skinner?

A. No, I don't recall.

Q. Do you recall whether on this third occasion you talked to Mr. Wible about Harold Sanderson?

A. No, I don't recall.

Q. Do you recall whether on this third occasion you talked to Mr. Wible about William Z. Foster?

A. I don't recall.

Q. Eugene Dennis?

A. I don't recall.

Q. John Williamson?

A. I don't recall.

Q. Gil Green?

A. I don't recall.

Q. Fred Fine?

A. I don't recall.

Q. Arnold Johnson?

A. I don't recall.

Q. Joseph Stalin?

A. I don't recall.

Q. Do you recall how long this third conversation with Mr. Wible lasted?

A. No, I do not.

Q. Now, I will go back to the first conversation, Mr. Eckert, and ask you whether on that occasion you gave Mr. Wible a written statement of your own?

A. No, I did not.

Q. I will ask you with respect to the first occasion whether after you talked to the agents—I think you said there may have been another agent in addition to Mr. Wible on that [fol. 266] first occasion—I will ask you whether after you talked to the agents on that first occasion they later returned with a written statement which they asked you to read and to sign?

A. They never returned with a written statement asking me to sign.

Q. I will ask you whether or not on the first occasion when you were talking to the Agents they made notes of what you were saying.

A. To the best of my recollection they did not.

Q. I will ask you the same questions with respect to the second occasion, first, whether on that occasion you gave the Agents a written statement of yours.

A. No, I did not.

Q. I will ask you whether on that occasion the Agents made notes of what you were saying to them.

A. To the best of my recollection they did not.

Q. I will ask you whether, respect to that occasion the Agents or one of them returned with a document in writing which they asked you to read over.

A. They never returned with a document asking me to read it.

Q. With respect to the third occasion, Mr. Eckert, I will ask you whether on that occasion you gave Mr. Wible a statement of yours in writing?

A. No, there was no statement given Mr. Wible at that time.

Q. I will ask you—

A. In writing, that is.

Q. What?

A. There was no statement given him in writing at that time.

Q. I will ask you with respect to that time, the third occasion, whether Mr. Wible took notes while you were talking to him.

A. To the best of my recollection he did not.

Q. I will ask you whether with respect to that occasion Mr. Wible returned to see you with a document in writing based on the conversation he had had with you.

A. No, he did not.

Q. I will ask you with respect to any of these three occasions whether the FBI Agents asked you whether you would give testimony in any proceeding involving Travis or Mine-Mill.

Mr. Kelley: May it please the Court, the Government objects to this as not proper cross examination having no bearing on the issues in this case and wasn't covered on the cross or on the direct examination.

The Court: The objection will be overruled.

[fol. 267] A. These three meetings?

Q. These three I have already asked you about.

A. I don't recall any.

Q. Do you recall whether at any of these three meetings you told the Agents that you did not care to testify against Travis or Mine-Mill?

A. I don't recall the conversation at those three meetings.

Q. Do you recall whether on any of those three occasions any of the Agents asked you whether you would testify for the Government in any case?

A. I don't recall it.

Q. Mr. Eckert, did there come a fourth occasion when you had a conversation with the FBI or any of its agents?

A. Yes, yes, there was.

Q. And do you recall when that was?

A. No, I do not.

Q. Do you recall when it was with reference to the third occasion?

A. No, I do not other than it was some time later.

Q. Do you recall whether it was a short time later or a long time later?

A. No, I don't.

Q. Do you recall in what city that took place?

A. I don't recall when the fourth occasion was and, therefore, I don't know where the city was.

Q. Let me ask you this: Was there a fourth occasion?

A. Yes.

Q. Was there a fifth occasion?

A. Yes, I think so.

Q. Was there a sixth occasion?

A. Well, I don't remember how many there were.

Q. I didn't ask you that, Mr. Eckert. I asked you specifically whether there was sixth occasion.

A. I don't know.

Q. Then your answer would be the same if I asked you whether there was a seventh occasion, isn't that right?

A. Yes, I think so.

Q. Going back to the fourth occasion—

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After Recess

Cross Examination.

By Mr. Witt (Continued):

Q. Mr. Eckert, getting back to the fourth occasion on which you talked to the FBI I think you have already said you don't remember when that was, is that right?

A. That's right.

[fol. 268] Q. Do you recall what year that was?

A. No, I do not.

Q. Do you recall whether it was the year 1949?

A. I do not recall.

Q. Nineteen fifty?

A. I don't recall.

Q. Nineteen fifty-one?

A. I don't recall.

Q. Nineteen fifty-two?

Mr. Vincent: If your Honor please, the Government objects. The witness has answered that question.

The Court: There is no use of going to the categorical years where he says he doesn't recall.

Mr. Witt: All right, sir.

Q. I don't remember now, Mr. Eckert, whether you remembered what city that took place in. Did you before the recess tell us what city?

A. I don't recall what city it was.

Q. Do you recall whether there was only one agent on this occasion or more than one agent?

A. I don't recall.

Q. Do you recall whether Mr. Wible was one of the Agents?

A. To the best of my recollection, Mr. Wible was.

Q. Would that also refresh your recollection that this conversation took place in Cleveland?

A. Yes, I believe it would.

Q. And it did take place in Cleveland, didn't it?

A. I believe it did.

Q. Mr. Wible was in the FBI office in Cleveland, wasn't he?

A. I don't recall where the meeting was held.

Q. No, that wasn't my question, Mr. Eckert. My question was whether you knew Mr. Wible worked out of the FBI office in Cleveland.

A. Oh, yes.

Q. And was there any occasion when you talked to Mr. Wible in the FBI office in Cleveland?

A. Yes.

Q. Was that this fourth occasion I have been asking you about?

A. I don't think it was.

Q. Do you recall whether on this occasion you talked to Mr. Wible about Travis or Mine-Mill?

A. On this fourth occasion?

Q. Yes.

A. I don't recall.

Q. Do you recall anything you talked about to Mr. Wible on that occasion?

A. No, I do not.

Q. Now, I think you said before the recess that there came a fifth occasion when you talked to the FBI. Did there [fol. 269] come a fifth occasion?

A. Oh, yes.

Q. Was that to Mr. Wible again?

A. I don't recall these later meetings; I don't recall whether it was Mr. Wible or not.

Q. Getting back for a moment, Mr. Eckert, to the fourth meeting I just finished asking you about, did you make any written statement or give Mr. Wible any written statement on that fourth occasion?

A. To the best of my recollection I did not.

Q. Did Mr. Wible take notes while you were talking to him on that occasion?

A. My recollection is that he did not.

Q. Did Mr. Wible come back to you after he talked to you on that occasion with a document in writing which he asked you to read over?

A. He never came back with any document.

Q. Did you ever sign any document for Mr. Wible?

A. Yes.

Q. When was that?

A. It was sometime after these series of meetings you have queried me about, but I don't remember when it was.

Q. Do you remember the year?

A. No, I do not.

Q. Now, coming back to the fifth occasion I was trying to ask you about, Mr. Eckert, I think you said you don't remember whether Mr. Wible talked to you on that occasion, is that right?

A. I don't recall.

Q. Was there only one agent on that occasion or more than one agent?

A. I don't recall.

Q. In what city did that discussion take place?

A. I don't recall the occasion; I just know there was a fifth meeting, that's all.

Q. You have already said you don't recall when it took place, is that right?

A. I do not.

Q. And you wouldn't recall anything you talked about on that occasion, is that right?

A. Nothing.

Q. Now, did you say before the recess that you would not recall whether there was a sixth occasion or not on which you met with the FBI?

A. Oh, I am sure there was a sixth occasion.

Q. Do you recall when that was?

A. No, I do not.

Q. Do you recall whether there was more than one agent on that occasion?

A. I don't recall the occasion.

Q. Then you wouldn't recall where the discussion took place?

A. No, I do not.

Q. You only recall that there was a sixth time when you talked to the FBI, is that right?

A. Yes.

[fol. 270] Q. Was that the occasion on which you made a written statement either at the time the agents talked to you or thereafter?

Mr. Kelley: May it please the Court, I think this has already been asked and answered and gone into and that the Court in its discretion could very well terminate this type of cross examination. It seems to me that if Mr. Witt has some FBI reports in which inconsistent statements appear, inconsistent with his testimony on direct, that we could get on with the law suit.

Mr. Witt: I object to Mr. Kelley's attempting to indicate the line of my questioning to the witness in the guise of

making an objection, and I move that Mr. Kelley be cautioned not to do that.

The Court: I think what Mr. Kelley is trying to do is probably shorten the examination. You asked him categorically with respect to these various matters as to each meeting, and probably when he says that he doesn't recall anything that happened in the meeting, that is sufficient; but, I have been letting you pursue your own method, and I think you may continue, but I wish you would keep in mind trying to avoid repetitious matters. I don't believe this question quite came in that category.

Mr. Witt: I have been trying to shorten my examination, Your Honor, and I think you are right.

The Court: You might read the question again, Mr. Reporter.

(The last question was read by the reporter.)

The Court: I think you may answer the question.

A. I don't recall whether that was the occasion or not.

Q. Did there come a seventh occasion when you talked to the FBI?

A. Yes, I am sure there was.

Q. Did there come an eighth occasion when you talked to the FBI?

A. Is this any period, this question?

Q. Any period from the time you left Mine-Mill in 1948 until you took the witness stand here last week.

A. Oh, yes.

[fol. 271] Q. Was there a ninth occasion?

A. Yes.

Q. Tenth?

A. Well now, I don't know. I didn't keep any records of these things. I would be inclined to think there was, but I don't know for sure.

Q. Would you be inclined to think there was a tenth occasion?

A. Yes, I think so.

Q. And an eleventh occasion?

A. I think so.

Q. Twelfth?

A. Yes, I think so.

Q. Thirteenth?

A. I can only guess now; I don't know.

Q. And you would then have to guess as to whether there was a fourteenth occasion also, is that right?

A. Yes.

Q. Now, if I followed your answers before the recess, Mr. Eckert, I think you said that you remembered a fifth occasion on which you talked to the FBI, but you were unsure about a sixth or seventh occasion. Didn't you give those answers before the recess?

A. I recall stating that I recall that there was a fifth, sixth, seventh, and eighth and so on.

Q. You don't recall testifying before the recess that although you thought there was a fifth occasion on which you talked to the FBI you did not remember whether there was a sixth or seventh?

Mr. Kelley: May it please the Court, this is argumentative. The jury will remember what he testified to before the recess.

Mr. Witt: This is preliminary, Your Honor.

The Court: I think I will sustain the objection because the testimony is here and it is argumentative in a sense.

By Mr. Witt:

Q. Mr. Eckert, did you talk to anybody about this line of questioning during the recess?

A. No.

Q. Did you look at any document which refreshed your recollection about this line of examination during the recess?

A. No, absolutely not.

Q. Do you recall giving testimony under my cross examination before the SACB about the number of occasions on which you talked to the FBI after you left Mine-Mill in 1948?

Mr. Kelley: May it please the Court, to go into what he testified to on the SACB is not testing his recollection as to anything that he said on direct examination in this case, [fol. 272] and the purpose of cross examination is to test

the veracity of what he said on his direct examination, not what he said before the SACB or on his cross examination.

The Court: I think he has a right to interrogate about that, but I will sustain the objection on the basis of the form of the question, unless the latter is pointed up. The witness has the right to have propounded to him a precise question that relates to this subject, not the question of the general subject, because you might think you interrogated about that and the witness may not recall. If there is any question, specific question or specific answer, why, that may be called to the witness' attention and he may be asked whether he so testified.

Mr. Witt: All right, sir.

The Court: I will sustain the objection, as I say, on the basis that the question is too broad.

Q. Mr. Eckert, when you testified before the SACB under my cross examination in Washington on March 29, 1957, do you remember my asking you the following questions and your giving the following answers? I have already given Mr. Kelley the page number. He has a copy of the transcript.

"Q. Approximately when in 1948 did you first talk to the FBI?

"A. Shortly after seceding from Mine-Mill & Smelter Workers."

That was the question and answer I read to the witness before the recess.

"Q. Do you recollect when the next time was that you talked to the FBI?

"A. Beginning at that time and every year and many, many times since I have talked to the FBI."

Do you remember giving those answers to those questions?

A. Yes, I remember those general questions of that nature and those answers.

Q. Then would you say in view of the answers you gave me a few moments ago that you remembered a twelfth occasion that when you testified before the SACB that there were many, many times, you were referring to about twelve times?

Q. Mr. Kelley: May it please the Court, I think that is an argumentative type question.

[fol. 273] The Court: I think that is argumentative pure and simple. I think the witness has testified here a number of times that he can't recall the exact number of times. You asked him specifically here and he answered he couldn't recall or wouldn't attempt to say the number of times, so I think that is argumentative, the last question, and the objection will be sustained.

Q. Mr. Eckert, I will get back now to the sixth occasion on which you talked to the FBI. Do you remember when that was?

A. No, I do not.

Q. And do you remember in what city that took place?

A. No, I do not.

Q. Do you remember whether there was only one agent on that occasion or more than one agent?

A. No, I do not remember.

Q. Do you remember any matter you discussed with the FBI on that occasion?

A. I do not remember the subject matter discussed at that particular meeting.

Q. Was that the occasion in connection with which you signed the statement you testified about a few minutes ago?

A. I don't recall.

Q. I will ask you on which of the twelve occasions you said you remembered talking to the FBI—

Mr. Kelley: Just a moment; that assumes a fact not in evidence.

Mr. Witt: I will withdraw it; I will get to it another way and save time.

By Mr. Witt:

Q. Now, you have testified, Mr. Eckert, that there was a seventh occasion on which you talked to the FBI. Do you remember when that was?

A. No, I do not.

Q. Do you remember in what city that was?

A. No, I do not.

The Court: I don't believe, Mr. Witt, there is any occasion in going over these each one separately. The witness, I think, has answered a number of times up to this occasion at least that he couldn't identify the time and so forth. Ask him if he knows the time of any of these subsequent meetings, if you want to enumerate them up to twelve you can, but I don't think you need to ask him with respect to each one of them.

[fol. 274] Mr. Witt: I would like to ask him a general question and see if that will shorten it.

The Court: All right.

Q. With respect to any of your meetings, Mr. Eckert, after the fifth one, any of the meetings after the fifth one, whether you remember when they took place?

A. No, I do not.

Q. I will ask you with respect to any of the meetings after the fifth one whether you remember where they took place?

Mr. Kelley: That question is vague, I think.

The Court: I think so, too, although counsel may be attempting to follow the suggestion of the Court, because if you have in mind any specific meeting, why, ask him about that. Maybe you better proceed on your own basis.

Mr. Witt: All right, I will rephrase that a little.

Q. Mr. Eckert, do you remember with respect to any of these meetings after the fifth in what city they took place?

A. Well, my recollection is that some of them took place in Cleveland.

Q. And do you have any recollection as to where the others took place?

A. My recollection is that some of the others took place in Cleveland, too, but I am not sure about it.

Q. I am asking you about all the meetings after the fifth now, Mr. Eckert. Do I understand your answer to be that some of them took place in Cleveland?

A. Yes, my recollection is that some did.

Q. And is it your recollection that some took place in other cities?

A. Well, other cities, Avon Lake, which is not in Cleveland proper. I think that one took place there.

Q. And the other city besides Cleveland or Avon Lake?

A. I can't identify which were the sixth, seventh, or eighth meeting.

Q. I didn't ask you that, Mr. Eckert; I didn't ask you yet to identify which sixth, seventh, eighth, or ninth meeting took place in any city. I asked you with respect to all the meetings after the fifth, and you said you have a recollection of at least twelve, to tell us the cities in which they took place according to your best recollection. Now, you have said some took place in Cleveland, one took place in [fol. 275] Avon Lake, and I asked you whether you remember whether any of those subsequent to the fifth took place in any other city?

Mr. Kelley: Now, I am not clear—maybe the witness is—but, he is talking about possibly the first twelve, or is he talking about from the time of the fifth meeting up until the time of this trial?

Mr. Witt: I have said over and over again in these last few questions I am talking about the meeting after the fifth. I am asking him after the first five.

Mr. Kelley: You interjected the figure twelve in your last question.

Mr. Witt: I will ask again so there is no doubt in the witness' mind that I am now asking about all meetings subsequent to the fifth, to tell us whether he recollects in what cities they took place.

A. I don't recollect where they took place.

Q. Did I understand you to say a moment ago that some of them did take place in Cleveland?

A. My recollection is that some meetings took place in Cleveland.

Q. And we are still talking about all of those after the fifth, Mr. Eckert, so that you don't misunderstand me.

A. Maybe I do misunderstand; I don't know when the fifth was.

Q. All right; now, I will ask you again so there is no doubt in the record. I am talking about all the meetings after the fifth, whenever they took place. I am not now asking you about when, Mr. Eckert, whenever they took

place, all the meetings after the fifth, whether you remember any of the cities in which any of them took place?

The Court: There is a false premise to your question. The witness keeps repeating; I think he said he didn't know or he didn't recall the fifth meeting as such, is that right?

The Witness: That's right, Your Honor.

The Court: And you are assuming that as having been a fixed time.

[fol. 276] Mr. Witt: I am not talking about the time, Your Honor.

The Court: Or the place.

Q. I will ask him, I will simply (sic) it. I will ask him now then to begin with the first meeting—because I am anxious that the record be clear—beginning with the first meeting as many meetings as he remembers, to give us the cities of each meeting until he exhausts his recollection.

Mr. Kelley: May it please the Court, I think that is—

Mr. Witt: Mr. Kelley is attempting to make this line of examination impossible, Your Honor. This question is a simple one and the witness is evading an answer to it.

Mr. Kelley: The question is not a simple one.

The Court: I am not so sure of that; do you understand the question he is asking you?

The Witness: Yes.

The Court: You may answer it then.

A. I recall at least the first three meetings were held in Cleveland. I am not sure from there on numerically which meeting was which or exactly where it was held.

Q. All right now, you referred a few minutes ago to a meeting in Avon Lake I think at your home, is that right?

A. Yes, I believe that's right.

Q. Now, I will ask you whether you recall when that discussion took place at your home in Avon Lake?

A. No, I don't.

Q. I will ask you with respect to that, one, whether there was one Agent on that occasion or more than one Agent.

A. I don't recall.

Q. I will ask you whether you recall whether Mr. Wible was present on that occasion?

A. I don't recall whether is was Mr. Wible.

Q. Do you recall what the subject matter of that conversation was?

A. No, I don't.

Q. Now, when was it that you lived in Avon Lake, Mr. Eckert?

[fol. 277] A. Well, during this period sometime in '48 or '49 until about 1951 or sometime around there

Q. Where did you move to in '51?

A. Well, if it was 1951 sometime about there, Saint Clair Shores, Michigan.

Q. How long did you live in Saint Clair Shores?

A. One year.

Q. And then where did you move to?

A. Grosse Pointe, Michigan.

Q. That is where you live now?

A. Yes.

Q. Now, Mr. Eckert, you said there was one occasion on which you did sign a statement. Do you recall when that was?

A. No, I don't.

Q. Do you recall in what city that was?

A. Yes.

Q. What city?

A. Cleveland, Ohio.

Q. Was that before or after the National Association of Die Casting Workers became affiliated with the UAW?

A. After.

Q. Do you recall where in Cleveland that was that you signed the statement, was it in the FBI office?

A. Yes.

Q. Did you say you didn't recall whether Mr. Wible was present on that occasion?

A. I don't think I said that.

Q. I will ask you whether Mr. Wible was present on that occasion.

A. Yes, he was.

Q Any other Agents?

A. Yes, there was.

Q. How many other Agents?

A. My recollection is that there was one other Agent.

Q. Do you recall his name?

A. No, I do not.

Q. Would it have been Mr. Fernandez?

A. It could very well have been.

Q. Do you recall whether that statement was related to the subject matter of your testimony on direct examination in this trial?

A. Well—

Mr. Kelley: May it please the Court, I think that answer calls for a legal conclusion.

Mr. Witt: I will withdraw it. I want to make it short, but Mr. Kelley prefers it the other way. I will do it the other way.

Q. Mr. Eckert, on that occasion did you discuss your own experiences in the Communist Party?

A. Yes.

[fol. 278] Q. On that occasion did you discuss Travis?

A. I don't recall whether I did or not.

Q. On that occasion did you discuss Mine-Mill or any other person associated or affiliated with Mine-Mill

Mr. Vincent: If your Honor please, I am not sure at this point whether he is talking about oral discussions on an occasion or whether he is talking about the written statement to which he has referred.

The Court: Well, he asked him about discussions is what I understood, not the statement. Read the question, will you?

(The reporter read the last question.)

A. Well, I understood him to mean the statement.

The Court: What do you mean?

Mr. Witt: All right, the statement. I will take it the answer pertains to the statement.

Q. In that statement did you refer to Mr. Travis?

Mr. Kelley: May it please the Court, if counsel is referring to the statement, it seems to me we should follow

somewhat the same procedure we did with this prior testimony.

The Court: Yes, if you have a written statement signed by the witness, the way to interrogate him is with respect to the statement, not test his recollection as to what is in the statement. As to what is actually in it is what we are interested in.

Mr. Witt: In view of the witness's answer I haven't the slightest idea whether I have a copy of the statement or not. That is what I am trying to find out.

The Court: Well, I will sustain the objection on the basis that the question is entirely too broad. If there is anything specific, the subject, something said about it may be entirely irrelevant and entirely out of the scope of the direct examination here and entirely out of the whole field that is involved here.

[fol. 279] (Conference at the Bench.)

In Open Court.

Q. Now, Mr. Eckert, I asked you this morning whether you testified before the Grand Jury in El Paso which indicted Jencks. As I recall your answer, you said no. Is that right?

A. My recollection of my testimony was that to the best of my recollection I did not recall testifying there before the Grand Jury, that is.

Q. Then, I think I also asked you before the recess whether the FBI talked to you about testifying before the Grand Jury which was considering the Jencks matter, and I think you said you didn't recall, is that right?

A. Yes, that's right.

Q. Mr. Eckert, I take it from the answers you have already given that in 1953 you were already living at Grosse Pointe, Michigan, is that right?

A. Yes, my recollection is yes.

Q. All right, I will direct your attention specifically to the month of April—I withdraw that, if I may, your Honor.

I am sorry. In the month of April, 1953, was your office in Detroit?

A. Well, I don't recall. It is about the time we moved I think. I don't recall.

Q. I thought you said a little while ago, Mr. Eckert, that you moved from Saint Clair Shores—I may have misunderstood you, but I thought you said you moved from Saint Clair Shores, Michigan, to Grosse Pointe, Michigan, in 1952.

A. You were talking about my home. Now you are talking about my office.

Q. Well, I want to find out about both your home and your office. Now, to refresh your recollection about your office I went back to your answers about your home. Now, if I understood you correctly, you said you were living in Grosse Pointe in 1952 and down to date, and I will ask you whether that doesn't refresh your recollection that in April, 1953, your office was in Detroit.

A. I don't recall just whether the office was in Detroit or in Cleveland.

Q. Do you recall then when you moved your office from Cleveland to Detroit?

A. No, I don't.

Mr. Witt: I am showing Mr. Kelley the document I intend to exhibit to the witness.

Mr. Kelley: I think, your Honor, that probably the document should be identified so that there will be some way of knowing what he refers to.

[fol. 280] Mr. Witt: I intend to before I show it to the witness. This would have to be marked for identification. I just showed it to Mr. Kelley first so he will know what I am doing.

The Court: If there is any direct reference to it, I think it ought to have an exhibit number on it. I do not know enough about what you are doing.

Mr. Witt: I would rather have it marked for identification.

The Court: All right, you may have it marked.

(Document marked Defendant's Exhibit A for identification.)

Mr. Witt: If the Court please, and ladies and gentlemen of the Jury, on the basis of this short informal conversation

I have had with Mr. Kelley, Mr. Kelley has agreed that this document, which has just been marked Defendant's Exhibit A for identification, may be received in evidence.

Mr. Kelley: Well, my understanding of our stipulation was that I would stipulate that this exhibit was received from the Government.

Mr. Witt: I will add that to the stipulation.

The Court: Well, I think the stipulation can so be. The question about its admissibility in evidence would depend on relevancy, and they would have a right to object if it is irrelevant or for any other reason even if it was furnished by the Government.

Mr. Witt: May the record show at this point so there may be no doubt about that that Exhibit A, Defendant's Exhibit A for identification was received by the defense from the Government pursuant to the order of the Court after we made a motion for production of the witness's statements.

The Court: I think the record can show that. Now, you may proceed then.

Mr. Kelley: I think we would like to see what line of questioning develops before we stipulate as to its admissibility in evidence.

[fol. 281] The Court: All right, you may proceed.

Mr. Witt: May we approach the Bench?

The Court: Yes.

(Conference at the Bench.)

In Open Court.

The Court: Let's let the record show about authenticity.

Mr. Kelley: The Government stipulates that Government's Exhibit A is an authentic record and makes no objection to its use on that ground.

The Court: All right.

Mr. Witt: All right, your Honor, I also move its admission in evidence at this point, because, as I explained—

The Court: The relevancy will have to be ascertained first. They have admitted the authenticity, and you may proceed to interrogate now, and we will pass upon whether it is admitted or not.

Mr. Witt: Mr. Kelley has made a suggestion that I think will take care of it.

Q. Mr. Eckert, I show you Defendant's Exhibit A for identification, which is a photostatic copy of a telegram from the FBI in Detroit to the Director of the FBI, SAC, Albuquerque, "SAC" standing for Special Agent in Charge, and I will ask you to read that to yourself and ask you whether that document refreshes your recollection that you talked to the FBI in Michigan in April, 1953, about Jencks.

Mr. Kelley: Are you through?

Mr. Witt: Yes.

Mr. Kelley: The Government objects to this for the reason that the line of questioning just preceding the production of this exhibit related to whether or not his office was in Cleveland or Detroit, as I recall primarily Detroit.

[fol. 282] Mr. Witt: Mr. Kelley is right about that, but earlier I asked the witness whether he recalled talking to the FBI about giving testimony against Jencks in El Paso before the Grand Jury, and the witness said he had no recollection, and that is the answer that I am seeking to refresh his recollection about.

Mr. Kelley: Then as to that—

The Court: Let the witness read the exhibit, and then he can answer it, whether it refreshes his recollection.

Mr. Kelley: Then we would like to add the further objection, your Honor, that as to that subject matter it is irrelevant to his testimony on direct examination. It has no probative value here, and it is extraneous as far as this case is concerned.

The Court: Well, let's see if it refreshes his recollection first.

Mr. Kelley: Would the Court care to see a copy of the exhibit?

The Court: Yes.

A. The question, I think I have forgotten what it is.

The Court: Please read the question. What was the question?

(The reporter read the last question.)

Mr. Kelley: The Government further objects to that for the reason it is going into a matter that is collateral to the issues in this case.

Mr. Witt: May I be heard on that for a moment, your Honor?

The Court: Yes.

Mr. Witt: In this—

The Court: We may be debating about something hypothetical unless the witness does say it does refresh his recollection with respect to the subject that was asked in the question, and I think he might answer that yes or no, and then we can get into the question that you are talking about.

[fol. 283] Q. Do you want to see this again?

A. No.

Q. Will you answer the question whether that refreshes your recollection along the line indicated?

A. It refreshes my recollection that there was a conversation with an agent in regard to some of the matters there.

Q. Now, do you recollect in what city that conversation took place?

A. Well, I just assume it took place in Detroit.

Q. I think you said it refreshes your recollection that you had a conversation with an Agent. Do I understand from that there was only one Agent on that occasion?

A. I don't recall whether there was one or two.

Q. Do you remember the name of the one Agent or the names of any of them?

A. No, I don't.

Q. Now, on that occasion did the Agent talk to you about Jencks?

A. Well, my recollection is that he did.

Q. And does that telegram that you looked at that I used to refresh your recollection with, Defendant's Exhibit A for identification, also refresh your recollection as to what you told the Agent about Jencks?

Mr. Kelley: The Government objects to that as irrelevant.

The Court: What is the relevancy of that in this proceeding?

Mr. Witt: Well, because—

The Court: In order to have any relationship to what he testified to on direct examination or as to his credibility or anything else—

Mr. Witt: That telegram relates to a meeting or meetings attended by Jencks at the St. Paul convention of Mine-Mill in 1947 about which the witness testified on direct examination.

The Court: If you wish to limit your question to something that he did testify to, for instance, my recollection is that he did testify that Jencks was at some meeting he attended, is that right?

Mr. Kelley: I don't recall, your Honor, whether he mentioned the name of Jencks as being at that convention or not. My recollection is that he didn't.

The Court: Well, that would be one thing I would want to know before I rule on the question.

* * * * * * *

[fol. 293] Kenneth Eckert resumed the stand, and testified as follows:

Cross examination (continued).

By Mr. Witt:

Q. Mr. Eckert, before the noon recess I was asking you about your conversation with the FBI in Michigan in April, 1953, about Jencks. I will now ask you that you have recalled that conversation whether you recall what you told the FBI on that occasion about Jencks?

Mr. Kelley: The Government objects to that as improper cross examination.

The Court: I will sustain the objection. The question is too general as has been pointed out. If there is any specific statement made that is relative to this case, you can inquire if such a statement was made or anything relative to it, but he may have talked to them about the subject, about a good many things that were not relevant in this case.

Mr. Witt: I follow your Honor.

Mr. Kelley: Your Honor, may I hand the witness a copy of the exhibit, Exhibit A, which—

The Court: Not unless the witness requests it.

Mr. Witt: I would just as soon let the witness have it. I have no objection.

The Court: You have no objection?

Mr. Witt: I have no objection to the witness looking at that while he answers my question.

The Court: All right, you can hand it to him.

Mr. Witt: May I say to the witness in answering the questions relative to this incident he may refer to that copy of the statement Mr. Kelley has handed to him.

[fol. 294] The Court: Very well.

Q. Mr. Eckert, do you recall whether on that occasion you told the FBI that you had met with Jencks in Communist meetings at the St. Paul convention of Mine-Mill in 1947?

A. I don't recall what I told the Agent at that time.

Q. Will you glance at that copy of the telegram which Mr. Kelley handed you and see whether that refreshes your recollection that on that occasion you did tell the FBI that you had had meetings with Jencks which were Communist meetings at the St. Paul convention of Mine-Mill in 1947?

A. It only refreshes my recollection to the fact that somewhere back there an Agent of the FBI asked, came, interrogated me about certain matters which apparently this is one of them. I don't recall the conversation with the Agent.

Q. But were there certain matters about Jencks?

A. I don't recall, but the Agent so states here.

Q. Do you recall whether on that occasion you told the Agent that Jencks attended a meeting at the home of Henry Horowitz in Chicago prior to the St. Paul convention of Mine-Mill in 1947?

Mr. Kelley: The Government objects to the form of that question. I don't think there is anything in the exhibit that relates to the question, and it points up the difficulty of using this type of an instrument which is somebody else's reporting something that this man is purported to have said and then trying to check his memory based on that, and it

seems to me that the question is confusing to begin with and it is irrelevant if understandable.

The Court: No, I think I will overrule the objection. You may read the question to Mr. Eckert.

(The reporter read the last question.)

A. I don't recall what I told the Agent.

Q. Do you recall whether on that occasion you told the Agent anything about a meeting at Henry Horowitz's in Chicago in 1947 prior to the Mine-Mill convention?

A. I don't recall what I told the Agent.

Q. You don't even recall that you told the Agent what the Detroit FBI stated in that telegram you were prepared to testify to, is that right?

[fol. 295] Mr. Kelley: Just a minute. That last part of the question makes it a little unintelligible. Will you read that question?

Q. Mr. Witness, will you listen to the question and see if it is intelligible to you?

(The reporter read the last question.)

A. I don't recall that. I don't recall even reading here I was prepared to testify.

Mr. Witt: I am finished with this line for the time being. So, the witness may hand that document to Mr. Kelley.

The Court: All right.

Q. Mr. Eckert, I will ask you whether in any discussion you had with the FBI at any time anywhere you ever told the FBI about Jencks' presence at Communist meetings at the St. Paul convention.

A. I don't recall the specifics of the conversations with the FBI.

Q. I am not asking, Mr. Witness, for—

Mr. Witt: I move that be stricken.

Q. Mr. Witness, directing your attention to my question which is whether you ever told the FBI to your present recollection about attending Communist meetings with Jencks in St. Paul at the Mine-Mill convention in 1947.

A. I don't recall what the conversations were with the FBI particularly.

Mr. Witt: I move to strike the answer, and I ask your Honor to instruct the witness to answer yes or no to that question.

Mr. Kelley: I think the witness has answered to the best of his ability.

The Court: You asked him if he recalls, that was the form of the question, wasn't it?

Mr. Witt: All right, sir.

The Court: I expect he could answer either "yes" that that did recall, "no" would indicate that he didn't. Was the word "recall" in the question?

[fol. 296] Mr. Witt: Yes, it was.

The Court: Well, on that basis I think he can answer yes or no if the question simply was did he recall ever telling anyone that.

Q. The question, Mr. Eckert, is whether you recall telling the FBI at any time at any place that you attended Communist meetings with Jencks at the St. Paul convention of Mine-Mill in 1947.

A. No, I don't recall whether I did or not.

Q. Mr. Eckert, I will ask you whether you recall now telling the FBI at any time at any place that you attended a meeting with Jencks at the home of Henry Horowitz in Chicago in 1947 prior to the St. Paul convention of Mine-Mill?

Mr. Kelley: May it please the Court, the Government objects to that, first because I think it has already been asked and answered, and second, if the examiner is trying to find out about some particular time when he talked to the FBI and may have made some statement about this he should produce the statement and ask him about it.

The Court: I will overrule the objection. I think it was possibly touched upon before, but I don't know if it was exactly covered. You can answer the question, Mr. Eckert.

Q. Would you like the question read back, Mr. Eckert?

A. No. I don't recall.

Q. Now, Mr. Eckert, I will ask you whether you recall talking to the FBI at any time or at any place about Chase Powers?

A. Well, I have a recollection of having told the FBI that Chase Powers was a member of the Steering Committee—

Mr. Deikman: Motion to strike that, Your Honor. It is not responsive to the question.

The Court: I think it can stand.

Mr. Witt: May I have the answer to this point read back, please?

(The last answer was read by the reporter.)

A. —and that the facts relating to Chase Powers and other members of the Steering Committee and other Communists in Mine-Mill & Smelter Workers could be—

[fol. 297] Mr. Witt: Now, stop that, Mr. Witness. I move to strike everything the witness started to say after he answered the question about Chase Powers began to talk about other Communists. That's typical of this witness and—

Mr. Kelley: Now then, I—

Mr. Witt: Just a minute, Mr. Kelley. I ask that this witness be directed to answer the question to the best of his recollection. When he has done so I ask that he be directed to stop and not to go on and act as counsel for the prosecution.

The Court: The original difficulty may have come from my denying Mr. Deikman's motion to start with. I think probably the question in the first instance calls for simply an answer of yes or no that he had mentioned the name, and so I think this can be stricken; and then if you wish to inquire about when it was and what was said, you may do that.

Mr. Witt: That's what I want to do.

The Court: So this last answer the jury will disregard, and the answer can stand that he had mentioned whatever this individual's name was in these discussions with the FBI.

Mr. Witt: All right, sir.

Mr. Kelley: May it please the Court, we ask that the remarks of counsel characterizing this witness be stricken from the record and that he be instructed not to so badger

Agent Emil Rothfass, and Special Agent J. F. Sullivan about Chase Powers?

A. I don't recall a specific inquiry as concerning Mr. Powers; I was interviewed by Mr. Sullivan on occasions.

Q. All right, I wil then show you again Defendant's Exhibit B for identification and ask you to look at that and see whether that doesn't refresh your recollection that on that date, December 28th 1955, you were interviewed by the two agents whose names I just gave you?

Mr. Kelley: May it please the Court, inasmuch as reference is being made to an exhibit specifically and the witness is being asked about the contents of the document, it seems to me that we had better admit them into evidence, and we are willing to stipulate at this time that they be received in evidence.

OFFER IN EVIDENCE

Mr. Witt: All right, Your Honor, I will accept that offer and stipulate that this particular document, Defendant's Exhibit B, be admitted in evidence.

Mr. Kelley: And Exhibit A, too.

Mr. Witt: I am not ready to discuss that.

The Court: What is this exhibit number?

[fol. 306] Mr. Kelley: Exhibit B.

Mr. Witt: The stipulation goes only to B, your Honor.

The Court: Exhibit B will be received in evidence, and either of you can read from it if you wish.

(Defendant's Exhibit B was received in evidence.)

Mr. Witt: All right, then before the witness continues, to refresh his recollection may I read it to the jury?

The Court: All right.

Mr. Witt: This is Defendant's Exhibit B, which is a copy of a letter or a report from SAC, Detroit, to SAC, Seattle, dated January 5, 1956:

"Kenneth Eckert, representative of the Die Casting Workers, UAW, AF of L, CIO, 408 Notre Dame, Grosse Point, Michigan, was interviewed by SA Emil Rothfass and SA J.F. Sullivan on December 28th 1955. Eckert, a self-admitted member of the Communist Party, 1932-1948, has

testified on behalf of the United States Government in various trials and hearings.

"Eckert, a former union official of the Mine-Mill & Smelter Workers, advised that he (Eckert) and Chase Powers were among the members of the CP Steering Committee in the Mine-Mill & Smelter Workers, 1946-1948, at which time he, Eckert, broke with the CP:

"According to Eckert the CP Steering Committee meetings were held before the meetings of the International Executive Board of the Mine-Mill & Smelter Workers, at which time Mine-Mill policy, party decisions and major decisions were discussed. During that period Chase Powers was a member of the executive board of the Mine-Mill & Smelter Workers. Eckert stated that he knew Chase Powers as a CP member from approximately 1945 to 1948, however he had never seen Powers' CP card since both belonged to different branches of the CP.

"Eckert advised that he would not furnish a signed statement and would not testify to the information set forth above. He stated that the time factor involved in testifying [fol. 367] would not enable him to carry on his current union responsibilities. In addition, Eckert indicated that in testifying in matters of this type it placed him in a very damaging position within his union."

By Mr. Witt:

Q. Now, Mr. Eckert, having heard that read, and asking you again to take all the time you need to look it over, I will ask you again whether you now recall that occasion on which you were interviewed by those two agents of the FBI?

A. I recall occasions. As to the specific occasion, Powers was one of many, many Communists I was interrogated about. I have no doubt but what that is substantially what I probably said at the time, but I don't remember the occasion or where or when. It was just one of a number of people I suppose they were asking me about.

Mr. Witt: I move that part of the answer be stricken in which he referred to "many Communists," after Powers.

The Court: The answer will stand.

Q. Do you recall now on any occasion, Mr. Eckert, either

and castigate the witness. It is for the jury to determine from his testimony, not from the words of counsel, as to his credibility.

The Court: I think the rule is, as I have explained to the jury a good many times, that they are the sole judges of the credibility of the witness, and the comments of counsel and the remarks of counsel, of course, are not evidence and should not be considered as evidence. You may proceed on your cross examination.

By Mr. Witt:

Q. Now, Mr. Eckert, did you talk to the FBI on only one occasion about Chase Powers or on more than one occasion?

A. I don't recall whether it was more than one or not.

Q. But, apparently you do recall at least one, is that right?

[fol. 298] A. Yes, at least one.

Q. And what you told them about Powers being a members (sic) of the Steering Committee, is that right?

A. I started to tell you what I told them.

Q. You got done telling us, didn't you, that Chase Powers was a member of the Steering Committee. I didn't ask you anything else, did I?

A. My recollection is that I informed—

Q. I didn't ask you what your recollection is, Mr. Eckert. Wait for my question. Now, on that occasion that you do recall, you recall when that was that you were talking about Chase Powers?

A. Well, it was after 1948; I don't recall just when it was.

Q. Can you fix that a little more closely as to any time between 1948 after you left Mine-Mill and the time you took the witness stand in this trial last week?

Mr. Kelley: May it please the Court, it seems to me it is wholly irrelevant when he may have talked to him unless they have some specific report in mind, because there is nothing to tie in this line of questioning with his testimony on direct examination.

The Court: The question may be preliminary.

Mr. Witt: It obviously is preliminary.
The Court: The objection will be overruled.

Q. Do you remember the question, Mr. Eckert?
A. Yes.
Q. Can you answer it?
A. Yes.
Q. All right, sir, answer it.
A. I don't recall when I may have talked to the FBI about Mr. Powers.
Q. The best you recollect now is that it was sometime between June, 1948 and January, 1958, is that right?
A. Well, it was certainly sometime in that period, all right. I would think it was sometime between 1948 and 1955, one or more occasions; I don't remember.
Q. Mr. Eckert, I will ask you this: Do you recall when it was that you talked to the FBI about Travis or Mine-Mill, when it was that you talked to the FBI about Travis or Mine-Mill the last time before you took the witness stand in this trial last week?

Mr. Kelley: Does that question presuppose he was talking about Travis and Mine-Mill?
[fol. 299] Mr. Witt: Yes, I thought that was included in the question.

Q. I am asking about talks to the FBI about Travis or Mine-Mill, and I am asking when the last time was that he talked to the FBI about Travis and Mine-Mill before he took the witness stand here last week.
A. Well, here in Denver I have made remarks to the FBI man here concerning Travis casually.
Q. When was that?
A. Last week sometime.
Q. What was it you said to the FBI man casually about Travis last week?
A. I said, "Travis has gotten pretty fat since the last time I saw him."
Q. Anything else you said to the FBI man? Incidentally, who was that FBI man, Mr. DeCook?

The Court: I don't know that this is relevant unless you point it up to some statement that has some bearing on the weight of the testimony.

Mr. Witt: These are all preliminary, Your Honor, with a witness who has such difficulty remembering I try approaching it in different ways, but I will try it some other way, Your Honor.

Q. Now, Mr. Eckert, I am not asking you about talks to the FBI about whether Travis got fat or not or what he is having for breakfast, I think you understand that, Mr. Eckert—

Mr. Kelley: May it please the Court, the Government objects to his interjecting things, "I think you understand that." I think he is trying to characterize the witness' ability to answer the questions. The witness is perfectly able to understand and draw conclusions from proper questions and answers.

The Court: That is the province of the jury. You may proceed.

Q. Mr. Eckert, I will ask you again when is the last time you talked to the FBI about Travis or Mine-Mill before you took the witness stand in this proceeding last week and gave the FBI information about Travis or Mine-Mill?

The Court: I think that question is improper as being too broad. You are leaving to the witness to judge whether it related to something that pertained to this case or something else. You asked the same question and he mentioned about Mr. Travis' weight, and that is no matter of concern for the jury or the Court or anybody else.

[fol. 300] Mr. Witt: I will rephrase it, Your Honor.

The Court: If you have any specific matter you wish to ask him about you may do that, but I don't think that this general question just like you asked about relating him to the Mine-Mill or anything else is sufficiently definite that the witness can answer intelligently.

Q. All right, Mr. Witness, I will ask you when the last time was that you told the FBI anything about Travis that you testified about in your direct examination on the witness stand in this trial?

A. Well, I have no recollection of any—if I understand the question correctly you don't want casual conversations I may have had with Mr. DeCook here; you want official

inquiries which might have been directed to me and my replies, if I understand the question?

Q. That's right, I think you understand that, Mr. Eckert, so answer the question to the best of your ability and recollection.

A. I don't have any recollection of the FBI as such asking me about Travis, at least since I testified in the previous trial here.

Q. I didn't ask you that, Mr. Eckert; I didn't ask you when the last time was after you testified in the previous trial. Without reference to the previous trial or anything else I was asking you when the last time was that you talked to the FBI about Travis and told them anything about matters you testified to on direct here, when the last time was before you took the witness stand here last week.

Mr. Kelley: May it please the Court, I think that that whole dissertation was in the nature of an argumentative question. The answer that the witness gave to the previous question, or at least started to give, was an honest and good faith attempt to answer his question, and then we get this long talk about trying to characterize the witness' ability to answer the question again.

The Court: Your argument is of the same nature on the other side that Mr. Witt's is on his side. I think if both of you would refrain from commenting about the witness or counsel. I don't think Mr. Eckert did answer if he recalls when the last time was that he talked to someone, as Mr. Witt has asked, within the limitations of that question.

If you recall, Mr. Eckert, you can so state. I think you [fol. 301] have mentioned the thing in general terms, but if you can specifically recall you might so state. If you can't you can so answer.

A. Well, I don't recall when the last time was.

Q. Do you recall when the last time was before you took the witness stand here last week that you talked to the FBI about Mine-Mill?

A. Your Honor, I am confused as to what is meant by talking to the FBI.

The Court: I think you have pursued it far enough unless you have some specific question.

Q. Now, Mr. Eckert, you said a moment ago that you told the FBI that Chase Powers was a member of the Steering Committee. Did you tell the FBI when it was that Chase Powers first became a member of the Steering Committee?

Mr. Kelley: The Government objects to that as irrelevant.

The Court: I am inclined to agree. What is the relevancy, Mr. Witt?

Mr. Witt: This is preliminary, Your Honor. I have some material I want to use.

The Court: Ask him again; ask him what the statement is. Ask him if he told them a certain specific thing and then if you have something that challenges that, that's the way to use that. You are asking him just general questions.

Q. All right, Mr. Eckert, did you tell the FBI that Chase Powers attended the meeting at which the Steering Committee was set up?

A. Well, I think I may have in a general way.

Q. You told them in a general way when it was set up, is that it?

A. Yes, I think in a general way.

Q. What do you recall you told them about when the Steering Committee was set up?

A. Well, I told the FBI in response to some questions concerning Mr. Powers and other people that I had testified before the CIO in a trial of the Mine-Mill & Smelter Workers by the CIO, that I had spent considerable thought in giving that testimony, that I had a transcript of that testimony, and that if they would take that, that would answer the questions concerning Mr. Powers and other people about whom they were inquiring.

[fol. 302] Mr. Witt: Now, I move to strike that answer and ask that the witness be directed to answer my question as to what he told the FBI about when the so-called Steering Committee was set up.

Mr. Kelley: I suggest that we have the question and the answer read back. I think it was exactly in answer to the question.

The Court: I am going to overrule the motion to strike, and the question will stand, and the answer.

Q. All right, I will ask you now according to your recollection of what you told the FBI, of what you told the CIO, when—

The Court: You ought to fix a time, Mr. Witt.

Mr. Witt: That's the purpose of my examination. I have something I want to use to impeach the witness with.

The Court: But, you have to fix the time of the statement. That's the point I am making exactly. You have to fix what he is supposed to have said and the time of the statement.

Mr. Witt: He has already answered that to the best of his recollection. He said he talked to the FBI about Powers sometime between 1948 and 1955.

The Court: If you are prepared to show a contradiction, you know when the statement was made presumably that you claim was contradictory, and that's the statement you should inquire about.

Mr. Witt: I have more than one, Your Honor, and I have already tried to get the time out of this man as to when he talked to them about Chase Powers, and the best he could do was to say it was between 1948 and 1955.

The Court: But, you know, I assume, if you are asking the question, you know the time of the alleged contradictory statement, and that's the thing that the witness' attention must be directed to, not a whole general course of conduct. It seems elementary to me that if you are going to impeach a witness or contradict the witness that the first step to it is that the witness' attention be called to the time and place [fol. 303] and what was said, and then ask if he made that statement. If he says he didn't, why then you can offer whatever you have by way of contradiction.

Mr. Witt: May I ask to have this document marked Defendant's Exhibit B for identification?

(Defendant's Exhibit B was marked for identification.)

Mr. Witt: If the Court please, and ladies and gentlemen of the jury, there has been marked as Defendant's Exhibit B for identification a document which appears to be a letter from the SAC, Detroit, to the SAC, Seattle. SAC, I take it, Mr. Kelley, standing for "Special Agent in Charge"?

Mr. Kelley: That's correct.

Mr. Witt: This document being dated January 5, 1956, and Mr. Kelley agreed that this document is authentic, being a photostatic copy which has been turned over to the defense.

Mr. Kelley: We stipulate to that.

Q. All right, Mr. Eckert, I will ask you to look at Defendant's Exhibit B for identification and ask you first whether that refreshes your recollection as to when it was that you talked to the FBI about Chase Powers?

Mr. Kelley: If the Court please, the Government objects to that for the reason that it is immaterial when he may have talked to the FBI about Chase Powers.

The Court: I think the question is preliminary; I will overrule that objection. You can object to anything that is irrelevant.

Mr. Kelley: I object to even going into this exhibit for the reason that it shows no consistency with the testimony of this witness.

The Court: He hasn't offered the exhibit and the Court doesn't recall what is in the exhibit, so let him answer the question.

The Witness: What is the question?

[fol. 304] The Court; You can read it to him.

(The last question was read by the reporter.)

A. It refreshes my memory to the extent that apparently I had more than one conversation with the FBI about Chase Powers.

Q. All right, Mr. Eckert, I will ask you whether that document refreshes your recollection about the conversation with the FBI about Chase Powers at that time, the time related to the date on that document?

Mr. Kelley: May it please the Court, the date that appears on the document may or may not have anything to do with the information contained in the body of the instrument.

The Court: He is simply asking him, if I understand it, if this refreshes his recollection as to what he said at the time indicated. That's the question.

Mr. Kelley: No, as I understood the question he wanted to know if it refreshed his memory as to the time he had the conversation which is the subject of the report, is that correct?

Mr. Witt: That's correct.

The Court: That's what I thought I said, just when the conversation took place.

Mr. Witt: That's all I have asked him now, Your Honor.

The Court: Let me hear the question.

(The last question was read by the reporter.)

The Court: I think you can answer the question.

A. I don't recall this specific interview with the agent.

Q. Now, Mr. Eckert, I understood you to say a moment ago that it refreshes your recollection that you talked to the FBI about Chase Powers on more than one occasion. Now, I will ask you whether you recall the dates of any of those occasions when you talked to the FBI about Chase Powers?

A. No, I don't recall the days.

Q. Do you recall any occasion on which you talked to the [fol. 305] FBI about Chase Powers at which time you advised the FBI that you did not care to testify on that matter?

Mr. Kelley: May it please the Court, that is irrelevant.

The Court: I think I will sustain the objection on the basis it is not specific. Counsel when he asks questions which are designed to contradict or to impeach the witness knows what the testimony is or what the statement is that he intends to rely on, and ask the witness over a period of years he ever made such and such a statement, that is one thing. I don't know how it would ever amount to showing a contradictory statement. A counsel knows, if at a certain time the witness allegedly made some contradictory statement he can fix the time of the statement from his information and ask the witness if at that time he didn't say so and so or didn't make such and such a statement. This general questioning as to ever making a statement of that kind I don't think is proper cross examination.

Q. Mr. Eckert, I will ask you whether you recall being interviewed in Michigan on December 28th 1955 by Special

that one or any other occasion, on which you advised the FBI that for any reason you preferred not to testify in any of these proceedings?

Mr. Kelley: The Government objects to that.

The Court: I will sustain the objection.

Q. Now, in that statement, Mr. Eckert, Defendant's Exhibit B, which I read to the jury, according to what the FBI said you told them, you told them that Chase Powers was a member of the Mine-Mill, or rather the CP Steering Committee and Mine-Mill during the period from 1946 to 1948. Now, I think in your direct examination you testified that the Steering Committee was set up either late in '45 or early in '46, am I correct in that, is that your recollection?

A. It was set up about that time; I don't remember the specific question propounded to me here.

Q. I will ask you then without reference to your direct examination what your present recollection is now as to when the meeting was held at which the Steering Committee was set up?

A. My recollection is late '45 or 1946.

Q. When you say late '45 you mean after September, [fol. 308] after October, what period?

A. Well, after September. I don't recall just when it was set up.

Q. And in what city did that meeting take place?

A. My recollection is that it was Chicago.

Q. And when you say it may have been early '46, what is the latest month you intend to fix by that answer?

A. I wasn't thinking of any specific month.

Q. I will ask you to think about it now and tell us in view of your answer that it was set up either late '45 or early '46, when your present recollection now is that it would be the latest time in '46?

A. Well, my recollection is that it was either the last part of 1945 or early part of '46, probably within the first four or five months, I am not sure which.

Q. Now, don't you recall testifying on direct examination here last week that there was a meeting of the Steering Committee before the executive board meeting of Mine-Mill which began on February 6, 1946?

A. Mr. Witt, I recall—

Q. '46 rather, '46?

A. Mr. Witt, I recall testifying to the facts as I know them. I don't have a mental transcript in my mind. I don't recall the questions asked of me.

Mr. Witt: I am sorry, Your Honor—

The Court: The record is here; the jury will recall that. I don't think you need to argue with him.

Mr. Witt: No, I don't care to argue with him, but I need it to pursue my line. It will take just a moment. Again his answer surprises me; he testified to it last week.

The Court: You are talking in general terms.

Mr. Witt: We will be at it in a moment, Your Honor. I am being as specific as I can.

The Court: Further, he said that he is now figuring the early part of '46, any time in the first four months or so, and the date you mentioned was within that time. I don't know the point to it.

Mr. Witt: We will be ready in a moment, Your Honor. My own recollection was apparently mistaken, and, ladies and gentlemen, I want to correct the record, so, I will go [fol. 309] directly to his testimony last week.

Mr. Kelley: May it please the Court, I do not quite get that point.

The Court: I do not either.

Mr. Witt: This is all preliminary, your Honor. I cannot do it all in one question.

The Court: I do not get the point of the argument or whatever you wish to call it you seem to be having with the witness now.

Mr. Witt: I have no argument with the witness. I just want to tie this down.

The Court: Proceed with your questions.

Q. Mr. Eckert, do you remember being asked the following questions and giving the following answers on your direct examination in this trial last week, page 92, "Question: Will you state what the Steering Committee was? Answer: The Steering Committee was a Committee designated by the Communist Party to co-ordinate the work of the Communist Party inside the Mine, Mill & Smelter Workers. Question: Now, did you state about when the

Committee was organized? Did I ask you that? Answer: Yes. Question: I missed the answer. Will you repeat it, please?" The Court at that point said: "He said in 1946." And the Court was referring that point to page 91 where the witness was asked by Mr. Kelley, "Do you recall about when that was organized? Answer: Well, my best recollection is that it was organized early in 1946." Now, going back to page 92, after the Court said, "He said in 1946. Answer: I said that was my best recollection, early in 1946. Question: And where was the Committee organized? Answer: In Chicago, Illinois. Question: And was there any meeting in connection with the organization of this Committee? Answer: Yes, there was." Do you remember those questions and answers, Mr. Eckert?

A. Well, I remember questions that have been asked me about this subject in hearings. I don't know specifically whether it was asked in this hearing or not.

Q. You don't remember whether you gave those answers to those questions here last week on January 14?

[fol. 310] A. I don't remember all the questions asked of me, no.

Q. All right, I will ask you whether you recall Mr. Kelley's asking you at page 92: "Question: Do you recall who was present at the time the Committee was set up? Answer: Well, some of the people present were John Williamson, Gil Green, Maurice Travis, Chase Powers, Al Skinner, Mr. Fred Fine, a Mr. Sanderson, Harold Sanderson were among those attending that meeting." Do you remember that question and that answer last week?

A. I remember them being at the meeting, but I don't remember the specific questions that were asked of me.

Q. Do you remember testifying last week, Mr. Eckert, about a meeting of the Steering Committee which was held prior to the February, 1946, Executive Board meeting of Mine-Mill?

A. February what?

Q. Before the February, 1946, Executive Board meeting of Mine-Mill.

A. I remember the meeting. I don't remember whether the question was asked me or not.

Q. Let me refresh your recollection. Let me ask you whether you recall testifying last week on January 14 on this trial

in answer to questions by Mr. Kelley, as follows: "Question: Now, directing your attention, Mr. Eckert, to February, 1946, I will ask you whether or not there was a Steering Committee meeting held immediately prior to a Mine-Mill Executive Board meeting. Answer: There was a Steering Committee meeting held immediately prior to a meeting of the International Executive Board about that time. I am not sure it was February. It was early in the year." Do you remember those questions and those answers?

A. I remember the meetings. I don't remember the specific questions asked.

Q. All right, sir, since you remember the meetings I take it you remember that one. So, I will ask you, was there a meeting of the so-called Steering Committee in February, 1946, attended by Chase Powers among others prior to the Executive Board meeting of Mine-Mill?

A. It is my recollection that there was a meeting of the Communist group at that time prior to that meeting.

Q. When you say "Communist group", Mr. Witness, you are referring to the Steering Committee?

A. The same people.

Q. Pardon?

A. Yes, generally, yes.

Q. Isn't that what you called this meeting in your testimony last week?

A. We had practically the same meeting before the—

Q. Answer my question, Mr. Eckert.

Mr. Witt: I move that that answer be stricken.

[fol. 311] The Court: Oh, no, I think you are just arguing largely with him. I do not see any contradiction or anything else in what we are talking about.

Mr. Witt: I think your Honor should withhold comments until I complete the whole line. It takes me time to examine this witness, and I think I should be permitted to go ahead.

The Court: You may go ahead.

(Document marked Defendant's Exhibit C for identification.)

Q. Mr. Eckert, I will ask you first whether you recall a

Mine-Mill Executive Board meeting in Chicago in February, 1946.

A. Yes, there was one about that time. I think it was February.

Q. Do you recall whether Chase Powers attended that meeting?

A. Well, I don't recall whether Powers was at that meeting or not.

Q. Was Mr. Powers the Executive Board member from District 7 at that time?

A. Well, he was the Executive Board member. He was on leave about, somewhere around there. He was a Board member officially.

Q. All right, since you apparently have some recollection now that Mr. Powers was on leave about that time I will ask you whether you have any recollection during what period about that time Chase Powers was—

A. I don't recall just when it was. My recollection is that somewhere back there Powers was sick for a while.

Q. Now, I refer you again, Mr. Eckert, to your testimony last week on direct examination, page 125, when Mr. Kelley asked you who was present at the Steering Committee meeting prior to the Executive Board meeting in February, 1946, and your answer was as follows: "Answer: Among those that I recall being present in addition to the members of the Steering Committee, were Maurice Travis, Chase Powers, Al Skinner, and I, Harold Sanderson. I don't recall the specific individuals who may have been there; I know that it was a large meeting, but I don't recall the names of all the other individuals." You now remember testifying last week that Chase Powers attended the Steering Committee meeting prior to the February, 1946, Executive Board meeting of Mine-Mill?

A. I don't remember whether I testified or not, but apparently I did. It so states.

Q. Is it your present recollection that Chase Powers did [fol. 312] attend that meeting of the Steering Committee?

A. So far as I can recall he did.

Q. But you don't recall whether Chase Powers attended the meeting of the Executive Board following the meeting of the Steering Committee?

A. No, I don't.

Q. Now, Mr. Eckert, I will show you Defendant's Exhibit C for identification which purports to be a copy of the minutes of the Executive Board meeting of the International Union of Mine, Mill & Smelter Workers at the Midland Hotel, Chicago, Illinois, beginning February 6, 1946, and ask you to look at that and tell us first whether you have ever seen a copy of these minutes.

Mr. Kelley: May it please the Court, the Government objects to using this type of material, because it is strictly hearsay, we have no foundation for it, and it is going into an immaterial matter and irrelevant matter. It is collateral to the issues here.

The Court: He hasn't offered it in evidence or offered any testimony or anything else. He is simply asking the witness if he knows what it is. You can make your objection when he makes an offer of proof or offers something in evidence or asks a question that relates to the matter.

Mr. Kelley: You want him to read all of this exhibit here?

Mr. Witt: All I asked him to do was to look at that document and see whether he recalls seeing a copy of those minutes.

A. Well, judging by the first page it purports to be Executive Board minutes of Mine-Mill at that time.

Q. When you were on the witness stand in the proceeding before the SACB, Mr. Eckert, you identified a copy of these minutes on direct examination, didn't you?

Mr. Vincent: I object to that, your Honor. What he identified in the SACB has no bearing in this trial.

The Court: I think I will sustain the objection.

Q. I will ask you to look at this document again, Mr. Eckert, and see whether it refreshes your recollection as to whether or not—do you mind taking it—as to whether or [fol. 313] not Chase Powers was present at that meeting of the Executive Board.

Mr. Kelley: May it please the Court, he is assuming something that is not in the evidence. He is assuming that

he recognizes that as the Board meeting. The only testimony we have is from Mr. Witt that it is.

The Court: This witness can answer if it refreshes his recollection or if it doesn't. That is all he is asking now.

Mr. Witt: That's right. I can show him a copy of a newspaper clipping.

A. It doesn't refresh my recollection any more than previously. I was in doubt whether Powers attended this meeting or not. It states here apparently the first day, I am only looking at the first day's proceedings, it doesn't show him attending.

Q. Does it refresh your recollection that at that time Travis was acting as Board Member for District 7?

A. Mr. Witt, no minutes of the Mine-Mill & Smelter Workers Executive Board could refresh my memory about anything, because they were all phonied up by the Party.

Mr. Witt: I move to strike that answer, if the Court please.

The Court: No, I think it will stand, because it goes to the very thing you are asking him, and I assume he says that this doesn't refresh his recollection.

Mr. Witt: If the Court please, I state to the Court professionally that I was present in Washington, D. C., when this man testified before the Subversive Activities Control Board and identified these minutes, this is a copy of the minutes offered by the Attorney General.

The Court: You asked him about that, and I think the witness, I do not know that he made answer, but, if that is pertinent, you can take the witness stand and be sworn, but I don't see how that is a relevant subject of inquiry. It is too collateral.

Mr. Kelley: It is not even inconsistent. He didn't say that it wasn't what purport to be the minutes. He didn't say that.

[fol. 314] The Court: He was trying to have the witness see if it refreshed his recollection, and he, the witness, said it didn't.

Mr. Witt: I will pass this for the time being, your Honor. I will come back to it.

Q. Now, I will ask you again that you have said that you don't recall Mr. Chase Powers being at the Board meeting whether your present recollection is that Chase Powers attended the Steering Committee meeting before that Board meeting.

A. He attended a meeting prior to the Board meeting of the top group of Communists inside Mine-Mill.

Q. A Board meeting?

A. Prior to a Board meeting.

Q. I am asking you about that particular Board meeting.

A. Prior to that Board meeting?

Q. If he did attend a meeting.

A. Yes.

Q. Now, Mr. Eckert, I will go back to your conversations with the FBI about Chase Powers and ask you whether aside from the conversation with the two Agents in December of 1955 you now recollect any further conversation with the FBI about Chase Powers at any time between 1948 and the time you took the witness stand here last week.

Mr. Kelley: May it please the Court, I think that has been asked and answered and gone far enough along this line.

The Court: I think it had been.

Mr. Witt: I didn't think so. I could be mistaken.

The Court: I can be mistaken too.

Mr. Witt: I think it would take less time to let him answer.

The Court: It might be shorter to let him answer the question. I think you can answer it.

The Witness: Your Honor, I am afraid I didn't get that whole question.

The Court: You may read it.

[fol. 315] (The reporter read the last question.)

A. None other than I previously testified to.

Q. Mr. Eckert, at any time after you left Mine-Mill in 1948 did you talk to any other Government Agents aside from Agents of the FBI about Travis?

Mr. Vincent: If your Honor please, the Government objects. That question is much too broad.

The Court: I am inclined to agree with you. I do not know who you mean by Government Agents. If you want to be specific, you can ask the question.

Mr. Witt: All right.

Q. Mr. Eckert, did you talk to any investigator of the McCarran Committee in 1952 before you gave public testimony before the McCarran Committee in Salt Lake City?

Mr. Kelley: The Government objects to that as irrelevant to this proceeding and not within the contemplation of 3500, and no matter what the answer might be I think it would be irrelevant.

The Court: I am not prepared to say that just on the face of this question. That question will arise when the subject matter of the conversation, if there was one, develops. I think he can answer the question which is simply, did he have a conversation with this investigator. That was the question, wasn't it?

Mr. Witt: That is the question.

A. Yes, I had a conversation with an investigator of the McCarran Committee.

Q. And when was that?

A. Sometime prior to the hearings. I don't recall just when.

Q. Where was it, do you recall?

A. Well, I am not sure whether I talked to him in Washington or in Cleveland.

Q. Do you remember the investigator's name?

A. Well, it seems to me his name was something like Connors or something like that.

Q. Did you talk to Mr. Connors on one occasion to your [fol. 316] knowledge or more than one occasion?

A. At least one occasion. I don't recall whether I talked to him on other occasions other than when I got to Salt Lake City there.

Q. All right, Mr. Eckert, I will ask you whether you recall that when you testified before the SACB on March 29, 1957, you recall being asked the following questions and giving the following answers on the subject of your talk with Mr. Connors.

Mr. Kelley: The Government objects to that for this reason: that the matter that he is trying to impeach him on now, apparently, if this is impeaching—

The Court: The Court doesn't know until he finishes the question. You finish your question.

Mr. Kelley: First, your Honor, let me make this—try to make my position clear: Nothing was testified to on his direct examination in regard to his testifying before the McCarran Committee, about any meetings there, about whether he had talked to any of the Committee representatives or anything of that nature. Now, he is bringing in testimony at some other hearing to compare with his testimony on direct examination.

The Court: I think he has a right to do that if it is relevant to his direct examination in the first instance.

Mr. Kelley: That is what I am pointing out. He said nothing about any testimony before the McCarran Committee.

The Court: That doesn't matter. Do you say, if I go over here in the court and say that Joe Smith committed a certain robbery over in the State Court and come over on the witness stand and say someone else did, do you say you cannot use my testimony to contradict me?

Mr. Kelley: I do not see the relevancy.

The Court: I do not know what the question is. Complete the question, and then I will see what your objection is. What is your question? Proceed. You need not answer until the Court has ruled on it.

Mr. Witt: Will the reporter read the question up to this point, please?

[fol. 317] (The reporter read the last question.)

Q. "Question: Mr. Eckert, you testified in a public hearing before the McCarran Committee at that time, didn't you? Answer: Yes. Question: Before you testified in the public hearing did you give testimony to the Committee in Executive Session? Answer: I am not sure I understand what you mean by that. Question: I will put it this way: Did you talk to any members of the Committee or any member of the staff of the Committee about the testimony you would give in the public hearing at any time before you did

testify in the public hearing? Answer: Yes. Question: Whom did you talk to? Answer: I talked to one of the investigators. I don't recall his name. Question: Would that have been Mr. Connors? Answer: What is the name? Question: Mr. Connors. Answer: I believe it was Mr, Connors and one other investigator. Question: Mr. Sourwine? Answer: I don't recall speaking to Mr.—"

The Court: I think that everything that has been read is consistent with his testimony.

Mr. Witt: I am coming to it.

The Court: Ask him the part that contradicts his statement.

Mr. Witt: I am finishing it off where it took place. I am going to refresh his recollection, and then I am going on. Just two more questions and answers.

The Court: All right.

Q. "Answer: I don't recall speaking to Mr. Sourwine prior to that. Question: On this occasion when you talked to Mr. Connors was Senator McCarran or one of the other Senators present? Answer: Not that I can recall. Question: Where was it you talked to Mr. Connors? Answer: The first occasion that I recall was in Cleveland, Ohio." Now, Mr. Eckert, I will ask you whether that refreshes your recollection.

The Court: Let me ask you—complete your question. Before you answer I want to have time to consider it. Proceed and ask your question.

Q. Did that refresh your recollection that you talked to Mr. Connors in Cleveland, Ohio?

[fol. 318] The Court: Where is there any contradiction in that and what he has testified to now?

Mr. Witt: Your Honor, he said he could not remember where it was, and I refreshed his recollection as to where it was preliminary to the other questions I want to ask him.

Mr. Kelley: He said it was either in Cleveland or Washington. Counsel is misstating the question.

The Court: I think it is collateral. Unless something more specific can be developed, I think it is right on the

borderline. The only thing you are trying to establish is that the meeting was in Cleveland, is that all?

Mr. Witt: As preliminary to asking him the questions I want to ask him.

The Court: He said it was in Cleveland or some place.

Mr. Kelley: I think he did. I think the record was clear that he said it was either in Cleveland or Washington, he didn't remember which place.

Mr. Witt: I want to go on with my question.

The Court: Does that refresh your recollection as to whether the talk was in Cleveland or Washington?

The Witness: Your Honor, at this moment I am not sure whether it was Washington or Cleveland.

The Court: Very well.

Q. All right, Mr. Eckert, when you talked to Mr. Connors on that occasion whether it was in Cleveland or in Washington did you tell him anything about Travis relating to the matters you testified to on direct examination here last week?

Mr. Kelley: The Government objects.

The Court: I do not think you need to answer that question. You can ask him if in that conversation, if he didn't state as follows, not interrogate him whether the thing was [fol. 319] mentioned, because if you have anything to impeach him or contradict him about, you know what it is, and the witness has a right to answer specifically as to that, and you should ask him, in that conversation did you state as follows.

Mr. Witt: Your Honor, may we approach the Bench a minute.

In Chambers

Colloquy Between Court and Counsel

The Court: The question I had in my mind is this: It is just a question of getting more or less straightened out on procedure. To impeach on contradictions, as I understand the rule, the witness must be asked if he didn't make the following statement at such and such a time and place. Then if he denies he did, why, proof can be offered that

he did make the contradictory statement. If he said he did make the statement attributed to him, then the contradiction, if there is such, appears in the record.

Now, it seems that simple to me, and these questions about a general subject I don't believe are within that rule.

Mr. Witt: Your Honor, that's why I was anxious to approach the bench, because Your Honor seems to me to keep anticipating what we are trying to do. Now, we are trying to do two things: one, we are seeking to impeach him in the usual way by showing prior contradictory statements or testimony, as for example I try to do with respect to Powers being in Chicago in February, 1956.

Now, maybe the confusion arises because I alternate, but if I do it is because of the character of the answers I get out of this witness; but, in any event I wanted to approach the bench to indicate to Your Honor the purpose of this line about his talk or talks with the investigators for the McCarran committee. This line is not for the purpose of impeachment, Your Honor; this line is for the purpose of making the record with respect to our demand under Section 3500.

Now, all we have gotten from the Government are copies of documents in the possession of the FBI. With respect to those we want to try to show that there are other documents in the possession of the FBI related to the subject matter of this man's testimony to which we are entitled under Section 3500.

[fol. 320] Now, as we tried to say the other day, in addition to documents in the possession of the FBI, as we see it under Section 3500 we are entitled to copies of statements as the word "statements" is defined in Section 3500, given to any agent of the Government; not merely to an agent of the FBI, and as we read that, Your Honor, "agent" includes investigators for the legislative branch of the Government. There is no distinction; Section 3500 doesn't refer to statements given to an agent of the executive branch of the Government. It simply refers to any agent of the Government.

The Court: Shouldn't that be developed before the Court? That isn't a question for the jury under any set of circumstances, is it?

Mr. Kelley: Nor is it matter within the knowledge of the witness.

Mr. Witt: We will do it either way as long as we make a record.

The Court: The jury, for instance, is never advised about what is withheld from them or what is given them or anything else, and if there is any question that you think, withholding of reports within the meaning of 3500, I would think it ought to be presented to the Court as a separate matter from the jury. I am asking you where the jury would ever enter that field at all.

Mr. Witt: Well, Your Honor may well be right on that. Perhaps the difficulty is that since we can't get an answer out of the prosecutors on this we have to interrogate the witness about it. Now, perhaps in order to make our record in connection with our motion for the production of these documents we should interrogate the witness out of the hearing of the jury.

The Court: It would seem to me that that would be the proper course, because I can't quite see where this fact would enter into the jury's deliberations at all. It is a question of production of matter under 3500.

Mr. Witt: All right, this is quite a problem. Let me state the entire problem as we are prepared to develop it so that Your Honor will know what we have in mind so that we don't do it piecemeal.

[fol. 321] The Court: All right.

Mr. Witt: We would just as soon do it all at once in one way, as long as Your Honor understands what we are after. Now, that's one problem, or rather two thus far. I want to interrogate him further about any other statements to the FBI in addition to those that have been given to us which relate to the subject matter of his testimony.

Two, I want to interrogate him about statements made to other agents of the Government.

The Court: Do you mean about the existence of the statements or the fact that a statement was made as distinguished from a contradictory statement?

Mr. Witt: That is right, the fact that a statement was made.

The Court: I think that foundation ought to be probably laid out of the presence of the jury.

Mr. Witt: All right, let me finish with what else we have in mind and perhaps we can do it all at once outside the presence of the jury. This is in connection with our effort to make a record not only under Section 3500, but with respect to our position as to grand jury testimony, but let me finish as far as Section 3500 is concerned.

There is another branch, too, that Your Honor will recall, which we raised, and that has to do with statements made to attorneys in the employ of the Department of Justice or employees of the Government. Your Honor knows our position now on that. It is that statements made by a witness, even if made to attorneys employed by the Government, should be produced for use under Section 3500, and we make the distinction between statements made by the witness as distinguished from what is called work product under Hickman vs. Taylor, and we want to make a record on that, and the only way we can do it is to ask this man if he has talked to Government attorneys, and develop that to see whether he has talked to them about the subject matter of his testimony. Now, so much for 3500.

The other branch of this whole line, Your Honor, has to do with his testimony before grand juries. There, too, we [fol. 322] are not doing that for impeachment, because we don't have his testimony before the grand jury; but, as we see that we have to interrogate him first as to whether he has testified before grand juries. I think he has already more or less answered that part of it, and then we have to ask him whether he has testified before grand juries about the matters which he testified to on direct, to lay a foundation for our demand that his grand jury testimony be produced for us, and it is our position, if the Court please, that since it is unlikely he will say that he gave inconsistent or contradictory testimony before grand juries, it is our position that if he answers that he doesn't remember with respect to any of the matters he testified to on direct, then that is sufficient foundation for the production of the grand jury testimony, at least to Your Honor if not to the defense.

The Court: The basic question I am interested in first is whether that should be done out of the presence of the jury

before the Court, the laying of this foundation with respect to the existence, let us call it, of other statements or with reference to the fact of whether or not he did this, that or the other thing. Offhand, I think that's a matter purely before the Court because the jury isn't concerned with it one way or the other.

Now, anything that tends to contradict, why, that's a question for the jury on the question of credibility. This wouldn't have any relationship to credibility or anything else, just as to the existence or the conditions relative to what you claim are other statements that the Government should furnish under 3500 or under some of these other theories you have.

Mr. Witt: We can do it that way.

Mr. Kelley: May I suggest something, Your Honor?

The Court: All right.

Mr. Kelley: Mr. Witt, I haven't read all of the SACB transcript, but it was pointed out here in court that he had asked the witness as to his discussions with agents of the McCarran Committee. Now, it may be that he has asked him about all these other things. If he has then on the basis of that he can make an offer of proof, and couldn't we take it from there somewhat without having to repeat all of that [fol. 323] stuff, make an offer of proof on that basis, and the Court could rule on it from that standpoint?

The Court: If he lays that foundation; I don't know a thing about it.

Mr. Witt: Maybe we can simplify it this way. We are still not too sure of the Government's position.

Mr. Vincent: Your Honor, if I am not mistaken, I thought Your Honor had already ruled in our first introductory conference on 3500 in regard to statements made to the congressional committees and the work product of attorneys and preliminarily on grand jury.

The Court: I don't recall, but I did rule on the congressional committee hearings. I know that I said that I didn't think it was a casual matter that applied to work efforts by attorneys, and I didn't rule on that. I gave my then opinion, which I still have, but sometimes I change my mind, and that's about anything which would be in the

category of work papers or work sheets or something prepared by an attorney in preparation for trial.

Is there any disagreement about the fact that it ought to not be a part of the testimony before the jury, but it would be a matter for resolution by the Court in connection with determining what they are entitled to under 3500, or these other theories that they have?

Mr. Witt: We have another problem about that as far as the jury is concerned, Your Honor, and why we think these lines of interrogation should be permitted before the jury; perhaps with some explanatory or cautionary instruction from Your Honor, and that is the question of this man's credibility.

The Court: I agree with you, and up to date within a certain limit. Like, for instance, you can ask him if he talked with attorneys or the FBI recently with the idea that the jury might make some inference with respect to the weight to be given his testimony; but, I don't think that would go to the question of the contents of the discussion or the statement of the discussion. That's where it seems to me the weakness of asking him what was said, because he may [fol. 324] have talked, for instance, to Mr. Kelley or to someone else about this case and still have no direct relationship to anything he testified to on direct examination.

There has to be some kind of limit of relevancy there.

I am not saying what I am thinking very clearly, but someplace in the thing, you can't just cover it by a broad question, for instance, "Did you have a discussion of the subject," or something like that.

Mr. Witt: Your Honor, since we don't have, for example, a copy of any statement he made to Mr. Connors of the McCarran Committee, we have to approach it indirectly to show that any statement made related to the subject matter.

The Court: You can ask him if he made a statement and all those things, but the contents of it is what I am getting at.

Mr. Witt: If we don't show anything about the contents we haven't laid a foundation for our position under Section 3500. We have to show that the contents has some relation to the subject matter of his testimony.

The Court: Under 3500 is a matter for the Court to determine on the basis of the statement. The first thing that you have to show is he made a statement to a Government agent, period. Then following the procedure of that, why, you can say, "We want that statement." Then the United States attorney can say, "Well, here it is, but we don't think it is relevant to the matter of the cross examination," and then the Court will determine that. That can't be determined on the basis of his testimony out here in the courtroom, I don't think.

The fact of the statement or whether such a statement was made, I think, is a proper subject of inquiry, but not out in the courtroom, but I would think in here, because I can't see where it has any relationship to the jury on the credibility angle. Now, if you would give me your views on that.

Mr. Witt: As I see it now up to this point, Your Honor, we have a man who on direct examination testifies to specific dates, places, the substance of what was said, going back at least to 1942, from 1942 to 1948, and when we get to cross examination on matters that the ordinary person would [fol. 325] have a good recollection about—for example, when he talked to the FBI, and especially when we asked him about particular subjects—he has no recollection. We think that is examination that bears on his credibility which the jury should know about.

The Court: That's a question for the jury, and you can argue all that to the jury, but I don't know what the Court can do about it. It has to be within the area of the direct examination or something that would relate to it, and of course the things you mentioned have been admitted for that very purpose, and you can say to the jury the very thing you just said to me, "Here is a man that on direct examination remembered everything and on cross examination doesn't at all." I think that's a question for the jury.

Mr. Witt: But if we pursue this whole line of interrogation outside the observation and hearing of the jury how will we be able to make that point to the jury in summation?

The Court: I am asking you in any of this conversation about the fact of whether he made a statement to somebody, how would that have any bearing on his credibility, under what theory?

Mr. Witt: Not on the fact that he made a statement, but the way he answers those questions bears on his credibility and his manner in answering them.

The Court: Just take this precise situation; you have him testify that he talked to this gentleman, this Mr. Connors or whatever his name was, the investigator for the McCarran Committee, he had a conversation with him. Now, there is no showing that he made a statement or signed a statement or anything else. Now, assume you asked him if he made a signed statement.

Then I think it would be appropriate for you to say, "We want that from the Government," and then we will proceed from there; but, if he made any specific contradictory statement to this man that can be established you can say, "Didn't you tell Mr. Connors such and such a thing," and if it is relevant here it will be admissible if it contradicts the testimony on direct. It looks just that simple to me. To ask him about the general topic of the conversation or some general subject, I think is within any rule of contradiction or even under the rule you are talking about.

[fol. 326] Mr. Witt: Your Honor, as I said, we are not seeking to contradict him with this line. How can we? I am trying not to shoot in the dark with any of these questions. I don't want to guess whether a witness, particularly a witness like this, and I am not doing it for that purpose, Your Honor. I can't roam all over the place and try to drag a contradiction out of him; I don't expect to do it. That's not the purpose for this line.

The purpose for this line is to support our demand for copies of these statements he made to other Government agents, and as I said, we will get to the question of U. S. attorneys; but, on the question of his credibility—

The Court: Let's stay with the first. Now, where is there any justification on that theory for asking the witness what was said in the statement unless it is contradictory?

Mr. Witt: Just to lay some basis for showing on the subject matter of his direct testimony, but if Your Honor wants us to stop there, I will be glad to if you will decide this issue and then ask the Government to produce any statements.

The Court: If he has given a written statement to someone or a statement that comes under the definition of 3500 you are entitled to a ruling on, you are entitled to a ruling whether they shall produce it when it develops that he did make such a statement, and then the question whether it pertains to the scope of his direct examination will be for the Court when the statement is produced.

Mr. Witt: That simplifies it.

The Court: What do you think about that?

Mr. Kelley: I think if we have to build a record that way, that would be the simplest way rather than trying to find out what the contents of the document might be if one does exist. The chances are, unless he signed a statement, he wouldn't know whether there was a statement made or not. Somebody might make a note or two or might go back and put something down from memory, and this witness would have no knowledge of it; but, the whole thing, it seems like we are getting so far afield. Here they have got this man's testimony on many, many occasions relating to this same subject matter; they have cross examined him. In [fol. 327] the trials where he has testified to these events to my recollection no one has ever gone on and contradicted the general nature of his testimony. There may be some places he has put a name in, some places he has left it out.

The Court: That goes to the credibility.

Mr. Kelley: That's right.

Mr. Witt: Mr. Kelley is trying to argue his case and stop the cross examination.

Mr. Kelley: No, I am not trying to stop his cross examination.

Mr. Witt: We want to show he has never been restricted.

The Court: I don't think they should be restricted on anything that shows contradiction. They can ask if it is a fact that there were statements made, but I don't believe that unless the statements are contradictory or come in a category that they can ask for the contents of it, because if there was a statement made that is judged by the statement itself.

Mr. Witt: Your Honor, we will be satisfied with that; in fact, it will make it simpler for me. If Your Honor is

satisfied that I asked him the question as to whether he made a statement, try to get it within—

The Court: You will have to bring it within 3500.

Mr. Witt: Yes, I was about to finish and say we will try to bring it within 3500, that whatever he said on that occasion or whatever the agent did amounted to a statement as defined in 3500. Then we will stop there and we will ask for its production pursuant to the motion we have already made.

The Court: That will be the first step.

Mr. Kelley: I think one of the first things to find out is whether or not he knows whether they made a recording.

Mr. Witt: As the Court said, we will have to try to show that it is a statement within the definition of 3500. Now, so [fol. 328] we will be clear and we won't have to waste more time going over this, Your Honor, shall we take a look at the other branches of this? Then after I am done with asking him about other agents who are not attorneys I intend to ask him about attorneys, and I will follow the same course Your Honor is suggesting, that is, not go into the contents. Then Your Honor can decide as to whether we are entitled to those, and if we are Your Honor can look at them and see whether they relate to the subject matter.

The Court: I want it understood that if you know of any contradictory statements there is no limitation on that.

Mr. Witt: This whole line we do not, and we will so state for the record. The purpose of this whole line about statements to other than agents of the FBI, to attorneys, testimony before a grand jury, we are not prepared to show contradictions or inconsistencies by the very nature of the problem. We don't have any of those.

Mr. Vincent: Your Honor, I don't quite understand how the defense can elicit the information they are seeking if they don't go into the subject matter. We will be right back where we were before with their questions, "Did you ever make a statement to such and such a person?" With regard to what? There must be some relationship shown.

The Court: I think that will be a problem. For instance, since you brought that up, I want to ask how logical this is: The first step in that proceeding would be to ascertain what

the nature of this—I mean for the Court to ascertain what the nature of this McCarran Committee was. It will be assumed then that the statement would have some relationship to the hearing. I think that would be a sound assumption. Then the next step, if it appeared that it did have something to do with what his direct testimony would be, to say, if it is proper—I am using this illustratively—to say, "Well, the Government can produce a statement if it comes under 3500" and then you gentlemen can give any objection you wish as to why you shouldn't produce it; but, I think it would develop, incidentally, what the subject of the inquiry was with reference to the statement.

Mr. Witt: That, Your Honor, will be answered.

[fol. 329] The Court: For instance, if they said, "Did you make a statement to Mr. Kelley," for instance, they have to bring it under 3500, and then it would be immediately obvious, I think, or in connection with some trial, say this very trial or something else. We could determine that. It seems to me that's the only logical way to pursue it.

The only question I have is whether it ought to be done before the jury. I don't see any prejudice one way or the other basically to it as long as there is no disclosure of the contents or alleged contents of the statements.

Mr. Witt: May we talk among ourselves for a moment, Your Honor?

The Court: Yes.

(Counsel and the defendant withdraw from the room.)

Mr. Witt: All right, Your Honor. We think it will save time and perhaps help us get a clearer record if we finish off this whole line outside the presence of the jury, because actually technically as we see it this line is in support of our motion for production and is not seeking to attack his credibility or to impeach him.

The Court: What do you think about that? I am inclined to that view. Has the Government some violent objections?

Mr. Kelley: I think that is all right.

The Court: I was just sitting here thinking while you were out. I think that is much the preferable way of doing it.

Mr. Kelley: I am wondering this then if that shouldn't be the first order of business, because as I stated to the Court early in this trial, that I didn't consider that I had any authority, and I don't think anybody in the executive branch of the Government has any authority to command the production of records of the Congress, and we should develop this to a point where we can know what the Court's ruling is going to be. I might say in this connection—I don't know whether we are probably getting a little ahead [fol. 330] of ourselves—but, it seems to me that that is something that can be reached by subpoena, if any exists, and is not contemplated by 3500; but, be that as it may, it seems to me the first order of business is to develop this so if there is anything that Your Honor orders us to produce we can make the best efforts we can if it is in a field where we haven't—

The Court: I think that is probably one of the latter stages of the thing. The first thing to find out is if there are any statements by definition that come within 3500. Then the question that you talk about will be considered next.

Suppose we get into a discussion of that. It would be purely hypothetical if this witness never made any statements that come within the category of 3500.

Mr. Kelley: Of course, chances are we don't know because he is not going to know whether they made a statement on the basis of the conversation.

The Court: If we can get what was done we would have a better notion of what was done than we do right now.

Mr. Kelley: Yes, but it is the mechanical processes. Suppose that there should be something the Court would tell us that we had to attempt to produce; then we have to contact Washington to see if there is anything that they can get and give to us, and we have to submit it to you and you have to go over it, and I thought the sooner that we can get to that and then if some of it is produced they may want to cross examine on it.

The Court: I have a notion about the time schedule. We have the jury around here now. If we go on until a little after 4:00, and they say at a quarter after 4:00 or so; that would be thirty-five minutes, on other type of cross examination. I hate to be doing this, so to speak,

on the jury's time, then one thing that is possible is for Mr. Witt to make a statement about what he thinks he can establish. Then I can possibly rule on that on his own assumption. I don't know whether it would be within the rule or anything, any of these categories he is talking about. Then we will get into the specific thing secondly; but, I think we better go ahead with the regular cross examination, and have the understanding that this matter about the production of further statements or reports or further records as indicated in their request will be for [fol. 331] determination by the Court, and that evidence won't be adduced before the jury. We may want to have Mr. Eckert in here and ask him about this, that, or the other thing as part of this presentation to the Court.

Mr. Witt: I am not sure I followed your Honor. Was your Honor suggesting that I go on to other matters that will go to the jury?

The Court: Something that doesn't go into this category at all, and then we come back in here, say, at quarter after 4:00, and my own notion would be, if you can make a statement about what you think can be developed, why, then on the basis of your statement, if the Government thinks that it should not be, I will listen to that and decide as a matter of law whether that was within the category of 3500 or these other matters. I think that is the best way to do.

Mr. Witt: All right, I will try to go to other matters until 4:15.

After Recess

In Open Court

KENNETH ECKERT, resumed the stand and testified as follows:

Cross examination.

By Mr. Witt (Continued):

Q. Mr. Eckert, did you testify before the CIO about a Party meeting which took place before the Executive Board meeting of Mine-Mill in February, 1946?

Mr. Vincent: I object to the form of that question, your Honor, and the procedure involved in asking it.

The Court: Read the question, will you, Miss Marson?

(The reporter read the last question.)

The Court: He may answer the question; the objection is overruled.

A. I don't remember whether I did or not.

[fol. 332] Q. Mr. Eckert, I will ask you whether you recall making the following statement when you made your statement before the CIO in January of 1950. "The first Party meeting of note after I became Board member was held in the early part of February in the City of Chicago in the Midland Hotel. The Board meeting was about to take place in this hotel. I believe the Board meeting started on February 6 of 1946. The matter discussed was the question of moving the Vice President, Ralph Rasmussen, to Chicago. He at that time was stationed in Washington here to handle legislative matters, matters which had arisen during the war affecting the union, and to remove from the pay roll a lawyer who was on Mine-Mill pay roll full-time who came from somewhere in Utah and whose name I don't recall at this time."

Mr. Witt: May I stop at this point, if the Court please, and ask the witness whether he is referring to Willard Morris as the name he used in this connection on his direct examination?

A. Yes, I think so.

Q. Morris was the lawyer from Utah?

A. Yes.

Q. Going on then, if the Court please, ladies and gentlemen, page 185, "The Party discussed those and made decisions to advocate that those policies be carried out in a meeting of the Executive Board. It was transmitted to this caucus and discussed by the caucus, and those policies were carried out. The minutes of the Board will show that Vice President Rasmussen was transferred to Chicago and that the lawyer was dispensed with. Mr. Bernstein: Who was present at that meeting? Chairman Potofsky: Address the question to the Chair. Do you care to an-

swer the question, Mr. Eckert? Answer: I cannot remember all the people who were present at the meeting. Some of the people who were present were Travis, myself, Al Skinner, Bernard Stern—a correction, I am not sure about Stern—Sanderson, who had the capacity of Assistant to Robinson or some capacity in the International Office at that time was at that meeting. I don't think Reid Robinson was at that meeting at that time." Do you recall making that statement before the CIO, Mr. Eckert?

Mr. Kelley: May it please the Court, it seems to me it is immaterial whether he recalls whether he made that statement before the CIO or not, irrelevant.

[fol. 333] The Court: Well, I assume that in it is some contradictory matter or statement he made on direct examination.

Mr. Witt: Exactly.

The Court: Without checking the record is that true, Mr. Witt?

Mr. Witt: What I am trying to show, your Honor, is exactly that.

The Court: The objection will be overruled.

A. The events sound familiar, but I don't recall whether it is the testimony I may have given.

Q. You don't recall then that when you gave those names which I read as people who attended that meeting you did not include the name of Chase Powers, you don't recall that?

A. I don't recall the testimony that was given at the CIO trial.

Q. Mr. Eckert, at any time when you gave testimony for the Government in the proceedings you have already referred to did you receive what is called an expert witness fee in addition to a per-diem?

A. Yes.

Q. All right, I will ask you with respect to each occasion, Mr. Eckert. Did you receive an expert witness fee for testifying before the McCarran Subcommittee in Salt Lake City in October of 1952?

A. No, I did not.

Q. Did you receive a per-diem on that occasion?

A. Yes, I did.

Q. Do you recall what that per-diem was?

A. Yes, I do.

Q. How much?

A. $9.00 a day.

Q. All right, Mr. Eckert, did you receive an expert witness fee for testifying on the Jencks trial?

A. My recollection is that I did.

Q. And do you recall what that expert witness fee was?

A. My recollection is that the expert witness fee was $25.00 per day.

Q. That was in addition to your per-diem?

A. Yes.

Q. Was the per-diem $9.00 a day at that time also?

A. I am quite sure it was.

Q. Did you receive an expert witness fee for testifying before the Grand Jury in the Gold case?

[fol. 334] A. I don't remember whether I did there or not.

Q. Did you receive a per-diem on that occasion?

A. I am not sure whether I did or not.

Q. Did you receive a per-diem for testifying on the trial of Gold?

A. Well, my recollection is that I did.

Q. Do you have any recollection as to whether you received the expert witness fee for testifying against Gold?

A. Yes, I think I did.

Q. How much was that at that time?

A. If I did, it was the usual $25.00.

Q. Did you receive a per-diem for testifying before the NLRB in the so-called decompliance case in 1954?

A. Yes.

Q. And did you receive an expert witness fee on that occasion?

A. My recollection is that I did.

Q. Was that also $25.00 per day?

A. Yes.

Q. Did you receive a per-diem when you testified before the Grand Jury against Travis?

A. My recollection is that I did, yes.

Q. Did you receive an expert witness fee on that occasion?

A. I think I did.

Q. Did you receive a per-diem when you testified against Travis on the first trial?

A. Yes, I did.

Q. Did you receive an expert witness fee on that occasion?

A. Yes, I did.

Q Was that $25.00 a day?

A. Yes.

Q. Was it $25.00 a day when you appeared before the Grand Jury in the Travis matter?

A. I think it was.

Q. Did you receive a per-diem in connection with testifying before the SACB in Washington in 1957?

A. Yes.

Q. And did you receive the expert witness fee on that occasion?

A. Yes.

Q. And was that also $25.00 a day?

A. Yes.

Q. Has the prosecution discussed with you whether you will receive an expert witness fee in connection with your testimony on this trial?

A. No, they have not.

Q. How long were you in El Paso in connection with testifying in the Jencks case, Mr. Eckert?

A. I don't, I don't recall how long it was.

Q. Did you receive the expert witness fee for every day you were in El Paso?

Mr. Kelley: The Government objects to any further pursuance of this line. I think he has shown that he received—

[fol. 335] The Court: I think I am inclined to sustain the objection.

Mr. Witt: All right then, I will try a general question, and perhaps your Honor will feel differently.

Q. Mr. Eckert, are you able to tell us how much, or are you able to estimate for the ladies and gentlemen of the Jury how much you have received altogether from the

Government as expert witness fees since you first began to testify?

Mr. Kelley: That is objected to as being irrelevant, and it is a matter of computation.

The Court: I think I will overrule the objection; if the witness can estimate, why, he may so state.

A. No, I don't have, never computed it. I don't know what it is.

Q. Mr. Eckert, do you recall your direct testimony last week when Mr. Kelley asked you when it was that you met Mr. Travis?

A. I recall some question along that line, yes.

Q. Do you remember your answer?

A. I don't remember the answer. I don't remember what answer I gave.

Q. Pardon?

A. I don't remember what answer I made.

Q. All right, I will ask you now what your answer is to my question as to what year it was that you first met Mr. Travis.

A. Well, to the best of my recollection it was either sometime in the last part of 1941 or sometime in 1942.

Q. Do you remember what month in '41 or what month in '42?

A. Well, if I remembered what month it was in '41, I would not speculate in 1942. I think it was 1941 or 1942. I don't recall the month.

Q. Well, I will ask you whether you recall when Mr. Kelley asked you about that last week in the following question you gave the following answer, page 82: "Question: The first time that I recall meeting Mr. Travis was about 1942 as near as I can recall." Or in answer to Mr. Kelley's question, "When did you first become acquainted with Mr. Travis?" Do you remember giving that answer last week?

A. I think I gave an answer along that line.

Q. Do you remember your answer to that question when you testified in the first trial of Travis?

A. No, I do not.

[fol. 336] Q. Then, Mr. Eckert, I will ask you whether you

recall on the first trial of Travis being asked the following question on that matter and giving the following answer: "Question: Now, will you tell the Court and Jury when you became acquainted with Maurice Travis? Answer: In 1941." Do you remember that question and that answer on the first trial?

A. No, I don't remember the question or the answer.

Mr. Kelley: We will stipulate that that was the question and the answer.

Mr. Witt: I don't care for any stipulation at this point, if the Court please.

Q. Mr. Eckert, I will ask you whether you recall your testimony last week about the meeting at Henry Horowitz's in Chicago in 1947, and specifically I will ask you whether you recall who you testified was present at that meeting.

Mr. Kelley: I think the Court has suggested a different procedure.

The Court: I will sustain the objection to that. The record will speak for itself. You can ask him who was present and then compare it with the record or however you wish to proceed.

Mr. Witt: All right, if the Court please.

Q. Mr. Eckert, I will ask you now to tell us according to your recollection at this moment who was present at that meeting at Henry Horowitz's in Chicago, 1947.

A. Which meeting at Horowitz's house are you referring to?

Mr. Witt: The same meeting you testified about last week that you said took place before the St. Paul convention.

A. Well, the meeting that took place before the St. Paul convention, the last meeting at Horowitz's house before the St. Paul convention—

Q. Excuse me, Mr. Eckert. Do you not recall testifying last week about that meeting that took place a few days before the convention opened?

A. I am trying to differentiate between another meeting at Horowitz's.

[fol. 337] Q. I am asking you to direct your attention that you testified to about on direct examination last week which you said took place a few days before the convention opened. You have that one in mind now?

A. I have in mind a meeting at Horowitz's house that took place shortly before the St. Paul convention.

Q. I am asking you to direct your attention to the same meeting which you testified to on direct examination and tell us according to your present recollection who was present at that meeting.

A. Present at the meeting were Gil Green, Fred Fine, a member of the Steering Committee Powers, Travis, Skinner, Harold Sanderson, Irving Dichter, Jencks, Horowitz, general counsel of the Union. These were some of the people I recall as having been there.

Q. All right, Mr. Eckert, I will ask you whether you remember being asked this question last week as to who was present and giving the following answer, page 149: "Question: Now, will you name those whom you can remember who were present at that meeting? Answer: The members of the Steering Committee, Maurice Travis, Al Skinner, myself. Harold Sanderson, Chase Powers, Clinton Jencks, William Gately, Mr. Dolan, Graham Dolan I believe his name is, Irving Dichter, Herman Clott, Gil Green, Fred Fine. These are names of some of the people that occur to me who were there." Do you remember giving that answer to that question last week?

A. It sounds along the line of my reply to it.

Q. Now, I will ask you about Dolan who you said in your direct testimony last week was present at that meeting. Will you tell us if you recall what Dolan's job was with Mine-Mill at that time?

A. I don't recall whether, what job he had or whether at that time he had been given a job officially.

Q. All right, I will ask you first whether you remember giving the dates of the St. Paul convention last week.

A. Well, my recollection is that I could not recall the date of the convention.

Q. If I understood your answer now you said that at the time of the Horowitz meeting you didn't remember, you don't remember now whether Dolan had been given any job by Mine-Mill.

A. I don't recall at the moment whether he had officially been or not.

Q. Well, I thought your testimony was that all the people present at this meeting aside from the Communist Party officials whom you named, Gil Green and Fred Fine, and the general counsel were officials or staff people of Mine-Mill.

[fol. 338] A. I don't recall limiting it to staff people of Mine-Mill, because Gil Green and Fred Fine were not staff members of Mine-Mill.

Q. I laid them aside. Perhaps I didn't make myself clear. Aside from Gil Green and Fred Fine whether or not you recall in your testimony of last week with respect to this meeting as well as others you testified about you testified that the people present were officials or staff members of Mine-Mill.

Mr. Kelley: May it please the Court—

Mr. Witt: I will withdraw the question.

Q. Now, did Dolan ever get a job with Mine-Mill?

A. Yes.

Q. And what was the job?

A. With the Party or Mine-Mill?

Q. I beg your pardon.

A. His job in the Party or in Mine-Mill?

Mr. Witt: Will the reporter read the question, please?

(The reporter read the question, as follows: "Now, did Dolan ever get a job with Mine-Mill?")

A. Yes.

Q. And what was the job?

A. Well, he had several jobs. One of them he became assigned to do so-called educational work.

Q. Was that the first job he had with Mine-Mill?

A. Oh, no.

Q. All right, I will ask you what Dolan's job with Mine-Mill was at the time of the St. Paul convention in 1947.

A. I don't recall what his specific assignment was at that time.

Q. But at that time is it your testimony that he was working for Mine-Mill?

A. I don't know whether at that time he had been put back on the staff or not.

Q. Mr. Eckert, don't you recall that the job of Educational Director was established at the St. Paul convention in 1947?

A. I don't recall when it was established.

Q. You don't recall that, Mr. Eckert? You don't recall that?

A. I don't recall when it was established.

Q. You don't recall that Mr. Dolan went to work for Mine-Mill as Educational Director after the St. Paul con-
[fol. 339] vention, you don't recall that?

A. I don't recall when he went to work as Educational Director.

Q. Do you recall testifying about when the Education Department was established and about Dolan's becoming the head of it when you testified before the SACB?

A. I don't recall what the testimony was.

Q. You say you don't?

A. No.

Q. Mr. Eckert, in view of that I will read you the following answers which you gave to the following questions when you testified before the SACB on March 28, 1957: "Question: Mr. Eckert, did the International Union of Mine, Mill and Smelter Workers have an Educational Department at any time while you were Board member? Answer: Yes. Question: Do you remember when that was established? Answer: Well, my recollection is it was established sometime in the latter part of 1947 or early 1948. Question: Do you recall who became the head of the Educational Department? Answer: Yes. Question: Who was it? Answer: Cozy Dolan. Question: Is that the man who is otherwise known as Graham Dolan? Answer: I believe that is his first name, Graham." Do you remember giving those answers to those questions?

Mr. Kelley: May it please the Court, I want, this question was prefaced on a statement by counsel that this occurred at the 1947 convention, and the material he has read into the record makes no reference to that.

Mr. Witt: I am coming to that. As Mr. Kelley is so fond of saying, I can't do everything at one time especially with a witness like this.

Mr. Kelley: I object to that and think counsel should be instructed not to characterize the witness in any way. That is within the province of the jury and not for this man.

The Court: I think counsel should refrain from commenting about the witness. The objection will be overruled on the basis that counsel says it is a preliminary question.

Q. Do you remember the question?
A. I don't think so.

The Court: I don't think there was a question.
Mr. Witt: My question is whether he recalled. I guess you—
[fol. 340] The Court: You asked if he did so testify at this hearing.
Mr. Witt: Yes, give the testimony I read to him.

A. I cannot remember my testimony at these hearings.
Q. All right, I will ask you now, having heard that testimony, Mr. Eckert, whether it is your present recollection that the Education Department was established in the latter part of '47 or early '48?
A. I am not sure at the moment just when the Educational Department was established.
Q. And I take it you are not sure at the moment then as to when Mr. Dolan became the head of it, is that right?
A. Yes, I think that's right.

(Defendant's Exhibit D was marked for identification.)

Q. Mr. Eckert, I take it from your testimony here last week that you attended the St. Paul convention of Mine-Mill in 1947?
A. Yes, I did.
Q. Now, I show you Defendant's Exhibit D for identification which purports to be a copy of the proceedings of the convention, the 43rd Convention of Mine-Mill at St. Paul in 1947, and ask you whether you have ever seen a copy of that document?
A. Yes, I have.
Q. All right; now, Mr. Eckert, I direct your attention to pages 185 to 188, beginning at the top of page 185, where I am pointing, with the heading, "Committee Secre-

tary Chavez, Education Committee." I will ask you to look at that and ask you whether that refreshes your recollection that the setting up of an Education Department was agreed upon at that time at the St. Paul convention?

A. Yes, I think that these events occurred substantially in so far as I can remember them.

Q. Would that refresh your recollection that it was after the St. Paul convention that the Education Department was established and that Dolan became the educational director?

The Court: What is the point to all this? I would like to be enlightened about it. There has been no objection. What is the point?

Mr. Witt: Well, Your Honor, the witness testified on direct examination that Dolan as a person working for Mine-Mill attended a Communist Party meeting before the St. Paul convention, and I am showing that Dolan wasn't working for Mine-Mill.

[fol. 341] The Court: You asked him about this Educational Committee. I understood the witness to say that he had worked in other capacities.

Mr. Witt: The witness comes up with that answer.

The Court: The witness never testified, as I understand it, on direct examination or otherwise, that Dolan was a member or connected with this Educational Committee when he attended the meeting in question.

Mr. Witt: No, he didn't, Your Honor, but this is my way of impeaching him. I want to show that Dolan wasn't working for Mine-Mill at the time of the Horowitz meeting before the Saint Paul convention, and I have to show with this witness from testimony I think he can give, that Dolan became educational director after the St. Paul convention. Then I will take him back to the Horowitz meeting and go over that ground again.

Mr. Kelley: May I make an observation, Your Honor? It seems to me that what counsel is trying to do is to get some kind of a defense on while cross examining our witness.

Mr. Witt: I object to this speech by Mr. Kelley.

Mr. Kelley: We object to that line of procedure.

Mr. Witt: I object to that.

The Court: The Court inquired about whether there was any basis for this being in here at all; apparently he is not through yet. Go ahead.

Mr. Witt: All right. I am not sure, if the Court please, whether there is a question pending or not.

The Court: I don't think there was a question pending.

Mr. Witt: No, I don't think so either.

By Mr. Witt:

Q. Now, Mr. Eckert, did you testify about the meeting at Henry Horowitz' before the St. Paul convention when you testified against Jencks in El Paso?

A. I don't recall whether I did or not.

[fol. 342] Q. Mr. Eckert, to refresh your recollection, I will ask you whether you didn't give the following answers to the following questions—

Mr. Vincent: If Your Honor please, there is nothing at this point to identify the document from which counsel is reading.

Mr. Witt: We have agreed it doesn't have to be identified.

The Court: He can ask him if at such a time and place he didn't testify as follows, and then offer the record, if there is a denial of the thing, or something like that. Go ahead.

Mr. Witt: We have agreed that his prior testimony—

The Court: You are asking him if he testified to the following, and what case now?

Mr. Witt: All right; this is the Jencks case.

Mr. Kelley: May it please the Court, it seems to me that when you go into these things that it should be on some material matter, and we object to it.

The Court: I am agreeing with you one hundred percent on that, and I don't know what he is trying to go into.

Mr. Witt: I am trying to show that this witness did not tell the truth when he said last week on direct examination that Dolan attended a meeting at Henry Horowitz' in 1947 before the St. Paul convention.

Mr. Kelley: Again the Government objects to the characterization of the testimony by this counsel. Now, he can let the jury draw their conclusions.

The Court: He answered the Court what he was trying to prove when he answered you. Go ahead. What is it you want to read from?

Q. All right, Mr. Eckert, I will ask you whether you remember the following answers to the following questions when you testified on direct examination in the Jencks case:

[fol. 343] "Q. Do you know the defendant Clinton Jencks?

"A. Yes, I do.

"Q. Is this him (indicating) sitting here, the third man at the table?

"A. Yes.

"Q. When did you first meet him?

"A. The first definite meeting I recall with Mr. Jencks was in 1947.

"Q. 1947?"

The Court: There is no use reading all this, if there is something that is contradictory—

Mr. Witt: I am afraid of an objection from my friends. I will go right to the place where he attended that meeting.

The Court: The jury will disregard that part that he read. If there is anything that you claim is contradictory let's hear it.

Mr. Witt: All right, on page 884 where he is asked, "Who attended that meeting at Horowitz'?" and this is what is contradictory with respect to Mr. Dolan, if the Court please—

Mr. Kelley: Now, that's counsel's own testimony, Your Honor.

Mr. Witt: I am answering the Court.

The Court: He can read it and the jury will be the judge of whether it is contradictory or not, but I want to be sure that that's the same meeting. There are two meetings at Horowitz' house, as I understand it.

Mr. Witt: The witness testified on direct as to only one meeting at Horowitz' house, and if he was going to make two meetings out of it the way he has done in the past, we will get into that.

The Court: One was the identification was fixed as the date of the Diefitter's meeting in Cleveland, wasn't it?

Mr. Witt: No, sir, it had nothing to do with it. On direct examination he testified as to only one meeting at Henry Horowitz' which took place—

[fol. 344] The Court: Let's get straight on that; is that right?

Mr. Kelley: He testified in regard to one meeting, but he has stated on cross examination that there were two meetings at Henry Horowitz' house in 1947.

The Court: Does this testimony you are about to read from relate to the meeting that he testified to on direct examination?

Mr. Witt: Yes, it does, Your Honor, and if the witness believes it doesn't, if he is going to develop some other meeting, then we want to get into that. I have had that experience with this witness before where two or three or four meetings grow, where he testifies at the beginning only to one, when he is faced with a contradiction.

Mr. Kelley: May it please the Court, I think in fairness to the witness if he is going to ask him about that he should give him the testimony to examine and let him read enough of it—

The Court: No, he is proceeding in the right manner. He can ask him if he testified, if the following question was asked and he gave the following answer. Go ahead, Mr. Witt.

Mr. Witt: All right; I was trying to.

The Court: If there is anything else you can bring it out on redirect. Go ahead.

Mr. Witt: I was trying to get to these names he mentioned in the Jencks trial, page 884, as being present at this meeting at Horowitz'.

By Mr. Witt:

Q. "Q. You recall who was present at the meeting?

"A. Well, in addition to Travis and myself there were the other two members of the Communist Party Steering Committee in Mine-Mill, Mr. Chase Powers from the West Coast, Mr. Al Skinner, then from Chicago, Mr. Jencks from the Southwest, Mr. Dichter from New York, Mr. Sanderson who was a national representative of Mine-Mill in the Chicago office, Mr. Bernard Stern, the research

director of the Mine-Mill & Smelter Workers, and other key Communists inside Mine-Mill,"

[fol. 345] Mr. McTernan, one of counsel for defense, moved to strike that last portion, and the Court—

Mr. Kelley: May it please the Court—

Q. —and the Court sustained the objection, Your Honor. Now, Mr. Eckert, I will ask you whether you recall giving those names in answer to that question when you testified against Jencks?

A. I recall the people being there, but I don't recall these volumes of testimony, what I may have given at various times.

Q. But, did you know, Mr. Eckert, when I read that testimony of yours from the Jencks case, you didn't say on the witness stand in the Jencks case that Mr. Dolan was present at Henry Horowitz' on that occasion, did you?

A. Did I notice it?

Mr. Kelley: Just a moment; the Government objects to that as argumentative.

Mr. Witt: I withdraw the question.

The Court: I think at this time—it is nearly half past 4:00—and I have to see counsel, that we will recess until tomorrow morning at 9:30.

* * * * * * *

In Chambers

The Court: Getting to the question of the defense developing that they are entitled, as I understand their contention, to the production of additional statements and the like, we discussed at the last recess, I have been thinking about the matter ever since we were in here, and I don't know of any way of proceeding except to let them offer whatever evidence they wish to offer with respect to the alleged existence of anything that they claim comes within the category that should be produced, and you can proceed from there. I thought at first we might have a statement of counsel or something, but I don't expect that will add to the thing, so my own thinking right at the moment is

that we will just have to get Mr. Eckert in here and let them interrogate him about the existence of any material that they think should be produced, and proceed from there.

Do any of you have any notion how we might more ex-
[fol. 346] peditiously proceed or anything?

Mr. Kelley: I think it is counsel's job to say whether they feel that that is the proper procedure, because they are the ones that are trying to make the record on it, and I wouldn't want to suggest anything that they might feel was not—

The Court: How do you gentlemen feel?

Mr. Witt: Yes, we think Your Honor is right, having given it further thought, whether Your Honor does it in chambers or in open court with the witnesses, but we think Your Honor is right in suggesting that it be done with the witness outside the presence of the jury, and instead of having counsel make general statements about their position. We think it will make a better record if we interrogate the witness.

The Court: Is he still around here?

Mr. Kelley: Yes, I have him in court.

The Court: He might come in. We have fifteen minutes now. If we can't get through we can start at 9:00 in the morning and have him here then, whichever is more suitable.

Mr. Witt: I am very fatigued; I would rather recess now.

In Chambers

* * * * * * *

[fol. 358] Colloquy Between Court and Counsel

The Court: I expect we may as well get Mr. Eckert in.

Mr. Witt: We are ready. Before getting to Mr. Eckert, one isolated problem before he comes in. Before the witness Eckert comes in there is one matter in connection with his testimony about his relationship with the FBI that we think should be discussed outside of his presence, and that has to do with his talk with the FBI in Detroit or in Michigan, I do not think it is clear where in Michigan, whether it was Detroit or Grosse Pointe, with the FBI in April, 1953, about testifying before the Jencks Grand Jury. There

is no part of the record, your Honor, the telegram from the FBI in Detroit to the Director of the FBI and SAC, Albuquerque, with reference to that matter. I think it is [fol. 359] Defendant's Exhibit A.

Mr. Kelley: I believe it is Exhibit B.

Mr. Witt: Well, the record will show.

Mr. Kelley: Is it Exhibit A which wasn't admitted?

Mr. Witt: I think that was admitted.

Mr. Kelley: Exhibit B was the one that was admitted.

Mr. Witt: It doesn't matter. Instead of referring to it as its designation as an exhibit I will just stand on the description which we are familiar with. That telegram is dated April 8, 1953, and I do not think the prosecution will dispute my statement as shown by the record in the Jencks case that Jencks was indicted on April 20, 1953. The telegram indicates that the Government was interested in having Eckert testify against Jencks before that Grand Jury.

Now, actually, as we see it, that telegram does not come within the definition of statement in Section 3500, because it is a communication internal to the FBI, and our conclusion is that, since it is clear that the FBI in Detroit talked to Eckert about Jencks at that time, there must be a document in the files of the FBI which does come within the definition of "statement" in 3500. Now, this matter is of considerable importance, your Honor, as we see it, because that telegram states only that Eckert could testify about Jencks in connection with Jencks' attendance at Communist Party meetings in St. Paul during the convention of Mine-Mill beginning on August 20, 1947. As it later turned out, the witness apparently did not testify before the Jencks Grand Jury according to his testimony here, but, as we know, he did testify in open court in the trial of Jencks in January, 1954. At that time he testified not only about Jencks and the St. Paul convention but also testified that Jencks was present at this, I think I can call it now this famous Horowitz meeting immediately prior to the St. Paul convention. So, we are entitled to draw the inference that when Eckert talked to the FBI in Michigan in April of 1953 he did not tell the FBI that Jencks was present at the Horowitz meeting, because, if he had, then it would follow that the telegram from the FBI Detroit dated April 8

would have referred to that matter. Instead, as I said [fol. 360] and as we know, it refers only to the St. Paul convention. So, we have serious suspicions about what happened here, but we could easily be wrong, but in any event the prosecution can clear the suspicions up very easily by either producing the statement which should be in the files of FBI Detroit or FBI Washington or FBI Albuquerque or FBI El Paso, the statement which Eckert made in April, 1953, or, as an alternative perhaps the prosecution could state for the record that they have looked for that as they would be required to do as shown by that telegram dated April 8 and can state professionally to your Honor that there is nothing in the FBI files anywheres underlying that telegram or which specifically amounts or could amount to a statement by this witness pursuant to the definition of "statement" in Section 3500.

The Court: Well, I do not know exactly your point, what you are making. The Government the other day told the Court and the Court accepted as true that they submitted to the Court as basis for the defense demand under 3500 all of the material or matters that they had that related in any way to the provisions of 3500. The Government looked that over, and the Court may have been more liberal than was proper in permitting this telegram to be given to you. It may not be a statement under the exact definition of 3500, and the Court, as I said, may have been overliberal in giving the thing, but I know of no statement along the line you mention that was in this material at all.

Mr. Witt: Well, that is not the point now, your Honor. Just to be—

The Court: The Government has announced that they gave the Court everything they had, so, I think that is a closed incident.

MOTION UNDER SECTION 3500 RENEWED AND RULING THEREON

Mr. Witt: Just to make the record and to be as technical as we know how to be we hereby renew our motion under Section 3500 specifically with respect to any statement by this witness whether made to FBI Detroit or to FBI Detroit in April, 1953, or at any other time dealing with Clinton

Jencks, and we think the least we are entitled to is a statement by the prosecution that there is nothing in the files of the FBI anywheres dealing with that subject matter.

[fol. 361] The Court: I do not think the Government will be required to make that statement, because the record was very clear the other day on their production, and the Court in the exercise of discretion conferred within 3500 looked the matters over, and the Court has given to you everything that the Court conceives you are entitled to under 3500, and the Court, of course, in the event there is a conviction and appeal, the matter will go to the Court of Appeals, and I do not wish even to discuss the details of these other matters that were withheld, and, so, that will have to rest on that basis.

MOTION TO REQUIRE GOVERNMENT TO ADVISE DEFENDANT THE AGENTS WHO INTERVIEWED WITNESS ECKERT

Mr. Witt: Finally, on this matter we have an alternative motion, we move that the Court direct the prosecution to advise the defense what Agent or what Agents interviewed this witness in Michigan in April, 1953, so that the defendant will be in a position to subpoena that Agent or Agents if it decides to do so.

Mr. Kelley: I think the telegram which you state you weren't entitled to contains the names of the Agents.

Mr. Witt: I think Mr. Kelley is mistaken about that. I can be wrong, but we can check that very easily.

Mr. Deikman: Just to make the record clear, it is Exhibit A that Mr. Witt is talking about.

The Court: All right.

Mr. Witt: Your Honor, as far as I can see there is no proper name. This is unsigned so that we can only speculate that before the Government handed this over to your Honor that the name of the signatory to this telegram was removed.

Mr. Kelley: I was thinking of the other one that was admitted, I think it said by whom he was interviewed, Exhibit B, but I think in view of all the discussion that relates to this Exhibit that it ought to be in the record some way. Whether it is in the record for the purpose of reading it

to the Jury, I don't care about that, but it is merely the identification of it to keep it in the record on appeal.

The Court: What is that?

[fol. 362] Mr. Kelley: It is the mere identification of the stuff to keep the exhibit in the record.

The Court: I would think so.

Mr. Kelley: Whether it is received in evidence or not—

The Court: It hasn't been received in evidence. The other has been. I expect there is sufficient identification of it to show it is in there. As I say, apparently, the Court being possibly overliberal in sorting the matters submitted gave this particular instrument when it may not have been a statement under 3500 at all. It related to something that purportedly Mr. Eckert said, and for that reason I included it. I do not know that anything further can be done about the matter.

OFFER IN EVIDENCE

Mr. Witt: Just to complete the record, your Honor, may we have that particular exhibit for identification admitted in evidence in view of that?

Mr. Kelley: We have no objection to it.

The Court: Then Exhibit A can be admitted in evidence.

(Defendant's Exhibit A for identification received in evidence.)

Mr. Witt: We have a motion pending now that, the last motion I made that your Honor direct the prosecution to turn over to the defense the name of the Agent or the names of the Agents who interviewed Eckert in Michigan in April, 1953.

The Court: What is your position about that?

Mr. Kelley: I don't know. I would like an opportunity to discuss that with counsel.

The Court: All right, you can do that, and then at the next conference we can decide what you wish to do about it.

Mr. Witt: Just one other matter before the witness comes in. We notice in examining the documents that your Honor turned over to us, what I will call the FBI docu-

[fol. 363] ments, that some obvious omissions occur on certain pages. Take this one as an example, this is one dated

under the heading at the top of the first page on what is called Form No. 1 under the heading "Date When Made" it bears the date of 10/30/50 made by David A. Wible whose name we have already here at Cleveland, Ohio, and the first page relates to something Eckert said about Jesse VanCamp, but the top of the page is blank showing what seems to us an obvious omission. We are not making a great to-do about it, but would that indicate that that is something that your Honor took out as being irrelevant after your Honor examined this document?

The Court: Yes. As I understand, the Court's duty under 3500 is to excise from the material submitted the portions that the Court does not believe comes under the provisions of 3500 as being properly furnishable to you. Where those blank spaces appear in what is submitted to you it was simply something that didn't come within the rule that they brought in when they made the photostats.

Mr. Witt: All right. There are several others. I take it from what your Honor just said pertaining to those that is the situation. There is one in particular we would like to refer to. This is what is apparently a letter dated May 8, 1950, from what appears to be the Cleveland office of the FBI to the Director of the FBI, and it bears the subject heading "Maurice Eugene Travis", and your Honor will recall that two-thirds of that page is blank. What we have left is only that one paragraph about five-eighths of the way down the page. I raise the question about this one in view of the heading or title of that letter which is the name of the defendant in this case. So, we would infer from that that everything which was contained in the original—

The Court: As the Court has pointed out, to the best of my ability I performed the functions conferred upon me by 3500, and the portions excised were excised in accordance with my understanding of the rule, and also as was agreed upon in the very beginning, as I understand the method of operations, that the Government would take the original form, the Court would indicate what was excised, and that would be omitted when the matter was photostated for submission to you. That is what it amounts to.

Mr. Witt: Thank you, your Honor.

[fol. 364] The Court: Now, can we get Mr. Eckert in?

(Mr. Eckert entered the Court's Chambers.)

The Court: In this examination I wish you would in the interest of brevity not go into matters covered in the Courtroom as much as you possibly can.

Mr. Witt: I will try to, your Honor.

KENNETH ECKERT, testified as follows:

Examination.

By Mr. Witt:

Q. Mr. Eckert, in the Courtroom yesterday I had begun to ask you some questions about your interview with Investigator Connors of the McCarran Subcommittee. I don't recall whether you said there was another investigator present. Was there?

A. My recollection is that there was not another investigator present at that time insofar as I can recall, that is, the prehearing conversations I had with this investigator, and I am not referring to any conversations I may have had in Salt Lake City, well, during the hearing or immediately prior to it. There may have been other people present at that time. I don't recall.

Q. I missed the beginning of your answer. Did you say your recollection now is there was no other investigator present with Mr. Connors in Cleveland or Washington, I think you said yesterday?

A. I don't recall another investigator being there at that time. There may have been. I don't remember.

Q. All right, will you listen to this, Mr. Eckert: When the witness was cross-examined before the SACB on March 29, 1957, he testified on this matter at page 1159 at the bottom of the page: "Question: And whom did you talk to? Answer: I talked to one of the investigators. I don't recall his name. Question: Would that have been Mr. Connors? Answer: What is the name? Question: Mr. Connors. Answer: I believe it was Mr. Connors and one other investigator. Question: Mr. Sourwine? Answer: I don't recall speaking to Mr. Sourwine prior to that."

The Court: I think you read that to him in the Courtroom yesterday, Mr. Witt.

[fol. 365] Mr. Witt: Just to get the continuity at this point, your Honor. Perhaps this is also repetitious, but I will try to avoid it. I think we will be done possibly with repetition with this question.

Q. Did you have one talk with Connors or more than one talk in some city other than Salt Lake City?

A. I had at least one talk with Mr. Connors in a city other than Salt Lake City. My recollection is that I met Mr. Connors in Salt Lake City just prior to the hearing. Whether I had conversations that pertained to the case or not I don't recall.

Q. I was asking you about conversations before you got to Salt Lake City, conversations with Mr. Connors in Cleveland, Washington, or any other city aside from Salt Lake. Is your answer that you recall only one other conversation in a city other than Salt Lake?

A. That is the only conversation I can recall at this time.

Q. Now, at that time—strike that, please. You testified when you did in Salt Lake City in October, 1952, about Travis and Mine-Mill, didn't you?

A. At Salt Lake City?

Q. Yes.

A. Yes.

Q. When you talked to Mr. Connors on the only occasion you remember before you got to Salt Lake City did you talk to him about Travis and Mine-Mill?

A. Well, I talked to him about Mine-Mill. I don't recall whether I talked to him specifically in regard to Travis or whether I handed him this CIO proceedings which I did on a number of occasions to other people, and I may have told him the information in this document.

Q. Aside from the CIO document do you recall whether you talked to Mr. Connors about any matters relating to Travis or Mine-Mill about which you testified on direct examination in this current trial?

A. I don't recall the subject of conversation with Mr. Connors other than generally in reference to this CIO trial and in regard to testifying.

Q. Aside from the CIO document did you give Mr. Connors anything in writing?

Mr. Vincent: We object to that question, anything in writing. It doesn't convey anything.

Mr. Witt: All right, perhaps Mr. Vincent is right.

Q. Did you give Mr. Connors anything in writing relating to Mr. Travis or Mine-Mill and specifically relating to [fol. 366] the matters you testified to on direct examination in this trial?

A. By writing, you mean my writing?

Q. Your writing.

A. I don't recall having given him anything in my writing.

Q. Did you give him anything in anybody else's writing about these matters aside from this CIO document?

Mr. Kelley: The Government objects to that as not within 3500.

The Court: What is your notion on that? The question here is whether he gave him a written statement or anything in writing of his own. I mean, if, for instance, if he handed him a newspaper or some other document, I do not see how that would come under 3500.

Mr. Witt: Well, it depends, your Honor, suppose, to take your Honor's example, suppose he gave Mr. Connors a newspaper clipping bearing on this subject matter as your Honor defines it and said, "Here is the story on it which I can testify about," as we read the definition of statement under 3500 that would come within it, because the witness has adopted—

Mr. Kelley: I think that is probably right. The definition of "statement" that we are dwelling on at this moment says, "A written statement made by said witness and signed or otherwise adopted or approved by him."

The Court: All right, he can answer it.

Mr. Kelley: I think it has got to include the "adopted" or "approved" to be a proper question.

Mr. Witt: This is preliminary. If he says he gave him something, I can ask him.

The Court: All right. Do you recall the question? Maybe you had better ask another question.

Q. Mr. Eckert, did you give Mr. Connors anything in writing (sic) in writing aside from the CIO document deal-

ing with any of the matters you have testified to on direct examination in this trial?

A. I don't recall having given him other matters or I don't recall having given him the CIO matter. I am not sure of it.

[fol. 367] Q. Now, I think you stated that you recall only one session with Mr. Connors before you got to Salt Lake City, is that right?

A. That is all I recall, yes.

Q. On that occasion did Mr. Connors take notes of what you were saying to him?

A. I don't know whether he did or not. I doubt it.

Q. I think you also said that you talked to Mr. Connors again when you got to Salt Lake City before you took the witness stand, is that right?

A. I think, yes, I did talk to Mr. Connors before then.

Q. Did you talk to him about Travis and Mine-Mill and specifically about any of the matters which you have testified to on direct examination in this trial?

A. The only thing I can recall talking to Mr. Connors at Salt Lake City when I got there other than the casual exchange of greetings, I don't recall whether there was any further prehearing discussion or not.

Q. But you do recall talking to him?

A. I recall meeting him there and exchanging greetings with him.

Q. Beyond that do you recall discussing any of the matters which you have subsequently testified to about when you took the witness stand before the McCarran Subcommittee?

Mr. Kelley: That has been answered about two or three times.

The Court: I think he has answered it two or three times. You can answer it again so there will be no question. I think you said you didn't recall anything about that.

A. I don't recall whether there were or were not other conversations.

Q. Aside from Mr. Connors did you talk to any other member of the staff of the Committee about the matters you subsequently testified about in those hearings?

A. I recall no other discussions with him outside of being introduced to a couple of them. I don't recall any discussions relating to the testimony. There could have been. I don't know.

Q. Now, Mr. Eckert, aside from the FBI and the staff of the McCarran Subcommittee I now ask you whether at any time before you took the witness stand in this trial last week you talked to any Agent of the Government from any department other than lawyers or attorneys about any of the matters you testified to on direct examination in this trial.

[fol. 368] Mr. Vincent: We object to that, your Honor. It calls for a conclusion of the witness.

The Court: Well, it does in a way, but it might simplify asking him the detail of it.

(The reporter read the last question.)

The Court: The question to me is rather vague, and I do not know that it is understandable. Do you mean from 1942 on to now or what do you mean?

Mr. Witt: At any time, your Honor. It doesn't matter under Section 3500. Of course, I think your Honor has in mind 1948. It doesn't matter. I think we are entitled to ask him about any time.

The Court: Well, that puts an awful burden on a man's recollection. I don't know exactly what you mean by agents of the Government or something of that sort, and the mere talking to them implies nothing. I mean, for instance, he might have talked to a Congressman or a half a dozen other different people about some phase of the case at some time between 1942 and now. I think I will sustain the objection, because the question is too general. If you wish to ask him if he made a written statement or anything that comes within the definition of the statute, why, I think that might be proper.

Mr. Witt: Your Honor, I have to ask him some questions especially since his recollection seems to be incomplete on almost anything. I can take two hours and break this question down, if your Honor prefers it. I will try it some other way.

Q. Mr. Eckert, at any time after you left Mine-Mill in 1948 did you talk to any person employed by the Government other than a lawyer or an attorney, other than a member of the Federal judiciary, other than a member of the Congress or the United States Senate about any of the matters you testified to on direct examination in this trial?

Mr. Crandall: I object to that. When he goes in to employees actually, it is extremely broad in that connection.

Mr. Witt: They object to agent. They say it is a conclusion.

[fol. 369] The Court: I do not know that conversations are involved here. What I thought we were going into is whether the witness had made any statements as they are defined in 3500, and the mere casual talks, he may have met someone down in the lobby of the hotel and asked him what the baseball game score was that day.

Mr. Witt: Or whether Travis was getting fat or not. Your Honor, I am not interested in that particularly with this witness. I have to ask him a preliminary question. If it is a casual conversation, if someone from the Immigration Service asked him if he knew Travis and that was it, we will drop it. But we should have some way of getting at it. If your Honor prefers to ask the preliminary questions, I would be delighted, but I am sure, if I asked him if he made any statement as defined in Section 3500, one of our friends on the other side would object that I am asking him for a legal conclusion. So, I am trying to make it as simple and put it in as simple and as lay language as possible. If it developes if his answer is "yes" to that, it was a casual conversation, it was about what he had for breakfast or what Travis had for breakfast, we will drop it.

The Court: Let him answer this last question, and we will see where we get with the thing. Read the last question to him, will you, Miss Marson?

(The reporter read the last question.)

A. Well, it is possible that I have—this would include National Labor Relations Board proceedings on petitions for elections, as I understand the question?

Mr. Witt: I ask that the witness be directed to stop wasting time. The witness knows what is going on, your Honor,

and I asked him about the matters he testified to on direct examination. He didn't testify to anything about NLRB proceedings, and I think this witness is permitted by your Honor to go entirely too far in interfering with my examination.

The Court: I am not prepared to say that that would not be something that the witness could have in his knowledge and you would not and neither would I, and I think the answer can stand, and you can proceed with your answer.

[fol. 370] A. I have received requests from the Immigration Department on several occasions to testify. I don't recall whether any of those inquiries, requests to testify concerned people or matters that I have testified to here on direct examination or not.

Q. How many requests have you received of that nature from the Immigration and Naturalization Service?

A. I don't know of the number. I could not say what the number is.

Q. Do you remember whether they asked you about any of the people connected or affiliated with Mine-Mill whose names you had occasion to mention in your direct examination?

Mr. Vincent: I object to that question, your Honor.

Mr. Kelley: I think it would have to be as to a material matter on his direct examination, not whether a person's name was merely dropped.

Mr. Witt: Again, it is preliminary, your Honor. I cannot put everything in one question, and then there will be the objection—

The Court: I think we will save time by letting him answer the question—the Jury isn't here—if he recalls about the matter.

Mr. Vincent: I might say there is nothing in that question that shows that it relates to the substance of this trial.

The Court: I agree with you entirely, but he says it is preliminary to something else. I mean the first step in the proceeding is whether he talked with somebody, and then we can go from that to something else if it does develop that he did.

A. I don't recall whether any of those requests related to people I have mentioned in this trial or not.

Q. All right, Mr. Eckert, you recall mentioning the name of Allen McNeal during your direct examination in this trial?

A. Yes.

Q. At any time did the Immigration and Naturalization Service ask you questions about Allen McNeal?

Mr. Vincent: Your Honor, the Government objects to that.

[fol. 371] The Court: What is the point to that, and how under any theory would that material be available to you under any rule here?

Mr. Witt: I would like to argue that, but I would prefer doing it outside the presence of the witness.

The Court: I think I will sustain the objection.

Mr. Witt: Well, your Honor, I would like to be heard on it outside the presence of the witness. If you do not want to ask the witness to step out, I would like to be heard on it in his presence.

The Court: Well, tell me briefly.

Mr. Witt: My recollection is that in the course of his direct examination the witness testified that he had a conversation with the defendant Travis in California in 1942 in the course of which Travis told him about Allen McNeal who was in the International Office of Mine-Mill and told him that Allen McNeal was a Communist and would tell him about the work of the Communists in Mine-Mill. I am trying to summarize that. Now, I want to find out from this witness whether he talked to the Immigration and Naturalization Service about Allen McNeal's being a Communist and whether he talked to the Immigration and Naturalization Service about his conversation with Travis in California in 1942 about Allen McNeal.

The Court: Well, what if he did? Let's put it that way.

Mr. Witt: I haven't taken the name "Allen McNeal" out of a hat, your Honor. I represent to your Honor professionally that I know there were some proceedings instituted by the Immigration and Naturalization Service in-

volving Allen McNeal, and that is why I am asking the witness about him. If he did, I want to find out.

The Court: The conversations he had are not relevant. The substance of them is not relevant unless there was something, the purpose of this, as I understood, was to develop whether or not there was something you are entitled to under 3500 and under some of these other contentions [fol. 372] that you make that should be produced by the Government. It is not a question of interrogating this witness about the conversations he had but the fact of whether there were any statements made or anything of that sort that you would be entitled to under the statute or under some of these theories. Now, I think that is very clear. It seems to me that this approach is getting into a field far away from that.

Mr. Witt: Your Honor, I am entitled to show under 3500, if we are right in our conclusion, and I do not think there can be any question about it, that a person representing the Immigration and Naturalization Service comes within the definition of agent of the Government in 3500, and we are entitled to show whether the statement he made, if he did make the statement as defined in 3500, contradicts the testimony he gave.

The Court: Not in the way of a casual conversation.

Mr. Witt: Of course not.

The Court: If he made a statement, I think you can ask him if he had any conversation with him and as a result of that he made any statement or something of that sort, not what was said and what was done, unless it was in the form of a statement, something that would be producible.

Mr. Witt: That is a legal conclusion. The witness doesn't know how a statement is defined in 3500, and I have to find out what happened. But I will do it the way your Honor suggests.

The Court: Proceed.

Mr. Witt: I take it you are anticipating overruling an objection of the Government. But I will make the record.

Q. Mr. Eckert, did you make any statement to any person representing the Immigration and Naturalization Ser-

vice about Allen McNeal and specifically your conversation with Travis in California in 1942 about Allen McNeal?

A. I don't recall having been asked or giving statement, written or otherwise, regarding Allen McNeal.

Q. And I think you said you don't recall the names of any other persons that have been connected or affiliated [fol. 373] with Mine-Mill whom that Service asked you about, is that right?

A. That is not the way I understood your previous question.

Q. I am sorry. Then, answer the question—

Mr. Kelley: The statement reflects his answer.

Mr. Witt: I am sorry if it doesn't seem clear.

Q. I will ask you, if it doesn't, aside from Allen McNeal, whether you have any recollection about giving a statement of any kind to a person representing the Immigration and Naturalization Service about any person connected or affiliated with Mine-Mill whose name you had occasion to mention in your direct testimony in this trial?

Mr. Vincent: The Government objects to that, your Honor. Again, there is no relevancy to this question.

The Court: I will let him answer instead of taking 20 minutes for argument. If we get down, if there is any question of whether there were any statements, we will consider it then. You can answer, Mr. Eckert.

A. I don't recall having discussed with the Immigration and Naturalization Service the names of people I gave here other than I may have given to the agents of that department of the Government copies of the CIO trial proceedings.

Q. Now, aside from the Immigration and Naturalization Service I will ask you whether you at any time have talked to any other person, any agency or department of the Government aside from the Immigration and Naturalization Service about any of the matters you have testified to on direct examination.

The Court: Well, that doesn't exclude FBI that he admitted he testified to.

Mr. Witt: Do you want me to get it all in one question? I want to save time, but I will put it that way if your Honor prefers.

Q. Excluding the FBI, excluding the Immigration and Naturalization Service, excluding lawyers and attorneys employed by the Government, excluding the Federal judiciary, excluding members of either House of Congress, I [fol. 374] will ask you whether at any time you have talked to a person or an agent of the Government about any of the matters you testified to here under direct examination.

Mr. Crandall: Your Honor, it is very broad when he says any person in the Government.

The Court: I think I will let him answer this question.

Mr. Kelley: Let him go, Bob.

A. You have not excluded the NLRB again, Mr. Witt.

Mr. Witt: I think the witness ought to stop wasting time.

The Court: I do not think the witness is wasting time. He answered the question once before, and I think the record will show he answered it in practically the same form. It may have included the Immigration Bureau and didn't before. So, you may go ahead and answer, just continue your answer.

A. Well, your Honor, there are a number of Government people in the course of my work I come in contact with which have not been excluded here including the U. S. Conciliation Service, National Labor Relations Board.

Mr. Witt: Your Honor, I asked the witness about the matters he testified to on direct examination, and I suggest again that the witness is interfering with my examination.

Mr. Kelley: I think it is completely possible he might have discussed some of these matters with them without their contacting him officially about it. It might have been the subject of a friendly conversation.

Mr. Witt: We are trying to find out. If it was, it is not a statement within 3500.

Mr. Kelley: That shows the ridiculousness of the procedure.

Mr. Witt: It shows the ridiculousness of the law.

If the Congress had left the law alone, we would not be wasting time.

[fol. 375] The Court: The witness has said it doesn't exclude the numerous people he may have talked to. What the purpose of the question is I gather is to ascertain whether he talked about any of the matters included in the direct examination with any of these agencies of the Government other than have been mentioned here or mentioned by you in the course of your testimony. Do you recall any other agencies?

The Witness: Well, your Honor, in the course of these conversations with the National Labor Relations Board, U. S. Conciliation Mine-Mill matters have arisen, and it is entirely possible that some of them were dealt with on direct examination. Now, I want to answer the question correctly. Other than those, the Immigration, the FBI, there is another Government agency or official that I talked with about myself in regard to registering under a law regarding having received training by a foreign government in sabotage, espionage, and other matters, and I had conversations with them, and in the course of that conversation it is entirely possible that Mine-Mill may have entered the conversation. I don't recall. I don't recall any other people of the Government in the categories Mr. Witt has asked me about that I have talked to knowingly or knowing who they were about any of these matters.

Q. Who was it you talked to about having received training in espionage and sabotage?

Mr. Vincent: The Government objects to that.

The Court: I will sustain the objection.

Mr. Witt: Your Honor, this witness testified on direct examination that he attended schools in Moscow, and I take from this answer that in talking with this particular agent of the Government he talked to him about his attendance at schools in Moscow, so, this relates to the subject matter on the direct examination.

The Court: I will sustain the objection. I think that is entirely irrelevant to ask a witness if he ever talked to anyone about a general subject. If there is anything

specific, why, or something of that sort, why, it might be proper, but I think that question is entirely improper.

[fol. 376] Q. All right, Mr. Eckert, in talking to this particular agent of the Government and telling him about what you know about espionage and sabotage did you have occasion to tell him you had attended schools in Moscow?

Mr. Kelley: That is objected to. We weren't permitted to go into any of the subjects that he was taught at that school.

Mr. Witt: We are not going into those subjects, your Honor, but your Honor denied our motion to strike his testimony about attending schools in Moscow, so, it is part of the subject matter of his direct examination. That is all I am asking him about.

The Court: Well, I didn't hear him say that he talked to anybody about all of this you are including in your question.

Mr. Witt: I am trying to find out whether he talked to this particular agent with whom he says he discussed espionage and sabotage about the fact that he, Mr. Eckert, attended schools in Moscow.

The Court: With respect to what he testified to on direct examination he testified to nothing about that on direct examination, and it clearly would not be within the scope of his testimony on direct examination. In fact, you were very careful about objecting to any testimony going into that field, and the Court went along with that idea, and the Government voluntarily refrained from examining about the details of these teachings and so forth, and, so, I think on the face of your question it is obvious that could not have been a subject that related to his direct examination at all.

Mr. Witt: Your Honor, we are not going into his teachings. This question is whether he told this particular person or agent of the Government that he attended schools in Moscow. Your Honor has permitted that testimony of his on direct examination to stand.

The Court: You can ask him that question.

Mr. Witt: That is the question.

The Court: No, it is not. You asked all about espionag and all of those things.

[fol. 377] Mr. Witt: I could be mistaken.

The Court: You can ask him wherever this was, the fact he went to school in Moscow.

Q. Will you answer the question as his Honor has just put it, Mr. Eckert?

A. What is that question?

Mr. Witt: Will Miss Marson please read the question back to Mr. Eckert?

The Court: It simply was if you discussed with him about your going to school at Moscow.

The Witness: Yes, I did.

Q. When was that, Mr. Eckert?

A. Well, two to four years ago shortly after that Act was passed. I don't recall just when.

Q. Was this an agent of the Department of Justice you talked to?

A. I don't know what his title is. It seems to me he was an agent of a board or some commission that had been set up under this law that has been passed.

Q. What was the law, do you recall?

A. I am referring to a law, as I understand it, that required anyone who received training by a foreign government to register with a designated agent of the foreign government or of the United States Government.

Q. Where did you make this statement to this person, what city?

Mr. Vincent: The Government sees no materiality in this line of questioning.

Mr. Kelley: May I suggest a procedure that might get at this thing a little quicker, your Honor? This law provides that a statement—

The Court: I am familiar with the law, and I assume Mr. Witt is, and I do not see any remote connection at the moment, but I do not want to curtail any inquiry they may wish to make that may lead to something that may have some relevancy here. I do not see any connection, but I think he can answer.

[fol. 378] Mr. Kelley: All I want to do is suggest to Mr. Witt, he doesn't have to follow it if he doesn't want to, and it is merely to find out if at this time he gave a written statement, signed it or otherwise or whether he knows—

Mr. Witt: I do not want to ask him that way, your Honor, and I do not want any statement in the presence of the witness.

The Court: Mr. Eckert, you may answer where the conversation took place.

Mr. Crandall: Before we go into that I think the record will show that he is assuming that a statement was made. If it appears—

The Court: No, the Court isn't assuming that at all.

Mr. Witt: Does Mr. Vincent have an objection? You have no objection?

Mr. Vincent: I wasn't saying anything.

Mr. Witt: I thought you had an objection.

A. My recollection is it was held in Washington, D. C.

Q. How did this come about, did you go to visit in person in Washington, D.C.?

Mr. Kelley: That is immaterial.

The Court: Yes, I do not see any relevancy to that at all.

Q. Mr. Eckert, on that occasion did you give this person or agent of the Government any statement in writing?

A. My recollection is that I did not.

Q. Did you register under that law that you referred to?

Mr. Vincent: We object to that question.

Mr. Kelley: That is immaterial.

Mr. Witt: Well, your Honor, I will take it, if he did register under the law—

The Court: What difference would that make with re-
[fol. 379] spect to what we are inquiring about now?

Mr. Witt: I take it, if he did register under that law, his registration or statement, whatever it would be, would necessarily include references to his going to school in Moscow about which he testified on direct examination.

The Court: Well, do you claim that a registration or an act of Congress would amount to a statement within the meaning of 3500?

Mr. Witt: Not an act of Congress, your Honor, but, if this man did register under such a law and in his registration statement or the form or whatever it was he had reference to any matter he testified to on direct examination, I think we would be entitled to a copy of that.

The Court: You can answer whether you registered or not, Mr. Eckert. Did you register?

The Witness: Your Honor, my understanding is that I did not register under the Act.

Q. Now, Mr. Eckert—

Mr. Witt: I am going to try to ask a general question, your Honor, to shorten this.

Q. Aside from the occasions you have mentioned were there any other occasions on which you made a statement to any person of the Government or any agent of the Government excluding the kind of people and the class of people I have mentioned—

The Court: I think he has answered that question about three times.

Mr. Witt: Each time we get something else.

The Court: No, he has answered the question. You need not answer further on that question.

Mr. Witt: We object to it, and we think your Honor is preventing us from making the record we are entitled to make on this. May we have a moment, please?

[fol. 380] The Court: All right.

Mr. Witt: If the Court please, I am done with my examination about statements made by this man to agents of the Government other than the FBI and lawyers and attorneys of the Government, and we now move that your Honor make an order requiring the Government to produce any documents which statements are defined in Section 3500 in the possession of the agents and agencies of the Government to which the witness has now referred.

Mr. Vincent: May I say the defense has not established in my mind yet that this witness has made a statement as defined in Section 3500 or that any subject matter of these discussions related to his direct testimony.

The Court: I agree with you entirely. I think there is nothing whatsoever in the showing made here that would indicate that this witness had ever made any statement to any agent of the Government within the contemplation of 3500 other than the statements the Government has already produced which the Government states are the only matter that would come within the provisions of the statute, and I think there is no indication that this witness has ever made any to the Government other than the FBI or the reports that have been produced here, any statement within the category of 3500, and, therefore, the motion will be denied.

Mr. Witt: Just to complete the record on this, your Honor, in the motion I did refer to "statement" as defined in Section 3500. Of course, in view of this witness's answers; particularly his answers that he cannot remember, we have no way of knowing and no way of dragging it out of this witness. So, in our motion we are calling on the Government, we are asking your Honor to require the Government to produce for us any documents which are statements as defined in Section 3500, and specifically in view of the witness's answers we are referring to any statements as defined in Section 3500 which the witness may have made to Mr. Connors or any other person representing the McCarran Subcommittee, to the Immigration and Naturalization Service or any agent thereof, and any statement as defined in Section 3500 or the registration, if any, which the witness referred to in connection with the law requiring registration of persons who have received training in espionage and sabotage.

[fol. 381] The Court: The motion will be denied.

Mr. Witt: May we have a recess now, and then I am going to another subject?

The Court: What do you mean by that?

Mr. Witt: By the other subject?

The Court: Well, yes.

Mr. Witt: Yes, in Chambers, the next subdivision I am going to interrogate him about which relates to his statements if any to Government attorneys.

After Recess

Mr. Kelley: May it please the Court, may I make one statement? It now appears that the Government will use a witness by the name of Fred Gardner, a person from Montana. I am merely mentioning it so that the defense will have as much notice of it as it was possible for us to give them.

The Court: All right.

Mr. Witt: Well, your Honor, what about the problem of voir dire and whether any person on the Jury knows Fred Gardner?

Mr. Kelley: Well, when Mr. Gardner arrives we will submit to him the Jury list and ask him if he knows any of them, and also we can state to the Court that at least at this time, and I will amplify it later when I have more information, but I will state to the Court that it is my best knowledge at this time that Mr. Gardner has never lived in this community.

Mr. Witt: But it is also within my knowledge, if the Court please, that Mr. Gardner has been in this community on a good many occasions, so, there is some possibility.

The Court: Well, I think you have advised them that you expect to call him, and you can ask him if he is acquainted with any of the Jury. I do not know of anything that can be done at this time about the matter. We can wait and see what he says. I am wondering about one thing: Is [fol. 382] there any objection to my notifying the Bailiff to let the Jury go until 1:30, because we won't make any progress until noon?

Mr. Witt: I have no objection.

Mr. Kelley: We have no objection.

The Court: You might get the Bailiff and ask him to come in here.

Mr. Kelley: I have no objection if Mr. Witt feels that the making of this record will take until noon.

The Court: It is after 11:00 o'clock, and we would just be going in there for about 15 minutes I assume. I think we might as well let them go.

Mr. Kelley: We might start at 1:00 o'clock.

The Court: That might be an idea.

(The Bailiff entered the Court's Chambers.)

The Court: It is obvious we are not going to get through here in time available before noon, so, I think you can tell the Jury—everyone is agreed on it—that they be excused now but to be back at 1:00 o'clock, and you can explain to them—I think it is proper, and I think there will be no objection—that we have been here in conference about matters this morning and that we won't get through in time to have much court before noon, and rather than having them wait around we will let them go to come back at 1:00 o'clock. Is that agreeable to everyone?

Mr. Kelley: That is agreeable to the Government.

Mr. Witt: It is agreeable to the defense.

(The Bailiff left the Court's Chambers.)

Mr. Witt: Your Honor, there is one matter relating to the witness's testimony on cross examination yesterday that I think I have to clear up before I go into this line, and that relates to his answer on cross examination yesterday as to [fol. 383] whether or not he testified before the Grand Jury in this Court which handed down the indictment in the so-called Pezzati case which is now pending before your Honor on the motion to dismiss. The witness testified yesterday afternoon, as I recall, that although he testified before the Grand Jury which indicted Travis, and he said he thought that was either 1954 or 1955, he didn't recall testifying before a subsequent Grand Jury. Now, I have the witness's testimony here before the SACB on March 29, 1957, where I cross-examined him about this matter. We could not find this reference—

The Court: I might ask him again, if you have any doubt about it, if he testified before any subsequent Grand Jury here.

Q. I will ask you, Mr. Eckert, did you testify a second time in this Court before a Grand Jury after you testified in the Travis matter?

A. Yes, I subsequently recall that I have been here before the Grand Jury.

Q. And when was that, Mr. Eckert?

A. That was either 1956 or 1957 to the best of my recollection.

Mr. Witt: This one matter, since the witness's testimony yesterday was before the Jury, we will return to it when we go before the Jury to get the record straight before the Jury.

The Court: All right.

Q. Now, Mr. Eckert, before you testified against Jencks in El Paso did you talk to any prosecutor or attorney representing the Government about the testimony you would give?

Mr. Kelley: The Government objects to that as being immaterial.

The Court: I think I will let him answer the question. I think I stated the other day and I will state again that I do not believe that an interview by a United States Attorney on the eve of trial of a case in preparation for the trial in the course of which he may even make notes for his own guidance in examining a witness, that anything in that category comes within the provisions of 3500, but so that they may make the record I think I will let him answer the question.

[fol. 384] Mr. Deikman: I think it is about time that we cleared up the matter on what the courts have held in regard to this particular thing.

The Court: Let's hear what the facts are, and I will hear you about what the law is. I will let him answer that question.

A. Yes, I did.

Q. Did you talk to one attorney in El Paso or more than one?

A. In El Paso I talked to more than one attorney.

Q. Do you remember their names?

A. Well, the one attorney was Mr. Alderman.

Q. Joseph Alderman?

A. Yes. The other attorney was the attorney from Austin, it was Herring or something like that.

Q. Charles Herring, the United States Attorney?

A. Yes. I talked to the United States Attorney in El Paso.

Q. Holvey Williams?

A. Yes, Mr. Williams.

Q. Did you talk to the other Assistant United States Attorney in El Paso, Francis C. Broaddus?

A. Yes, I talked to him.

Q. And in those talks did you tell the lawyers what you knew about Jencks as a Communist?

Mr. Kelley: Objected to as immaterial and irrelevant. If he made a written statement or signed—

The Court: Assuming, and I expect it can be admitted that previous to the trial he discussed with the attorney who was going to conduct his examination the subject of his testimony, I expect there is no secret about that.

Mr. Kelley: No, I would think everybody would assume that, your Honor, but unless he made a written statement and signed it or otherwise adopted and approved it or knew some kind of a stenographic or other recording, transcription was made substantially verbatim, we would not be interested in it at all. I do not see why any preliminary questions are necessary.

The Court: I am trying to save time. I would assume the import of the testimony is that he discussed the case with the attorneys who were going to conduct the trial immediately prior to the trial and went over the testimony he [fol. 385] intended to give at the trial with them. I think that would be my inference from what he said.

Mr. Witt: That's right.

Mr. Vincent: That was in a different case. That is in the Jencks case. That is not concerned with this trial.

The Court: I know it is in the Jencks case. So, you may proceed with your examination.

Mr. Witt: All right. I am not sure there is a question pending.

Q. Will you answer the question?

A. I talked with some of those attorneys about the case.

Q. And when you talked to them did you tell them that you would be able to testify that Jencks attended the meeting at Henry Horowitz's?

The Court: I do not think—proceed and complete your question.

Q. —at Henry Horowitz's in 1947 prior to the St. Paul convention of Mine-Mill?

A. I don't recall what it, what I told the attorneys in the pretrial discussions.

Q. Did you tell them about being in the Communist Party meetings with Jencks in St. Paul while the Mine-Mill convention was going on in 1947?

A. I don't recall the questions and answers that they propounded to me.

The Court: I do not think you need to pursue that any further, Mr. Witt. You can ask him if he gave them any signed statement.

Mr. Witt: That is my next question, your Honor.

The Court: All right.

Q. Mr. Eckert, did you give any attorneys a statement that you had prepared, signed or unsigned?

A. None other than I may have given them the transcript of the CIO trial.

Q. While you were talking to any of those prosecutors was there a stenographer present?

A. No.

[fol. 386] Q. While you were talking to any of those prosecutors did they make notes?

A. I believe that some of them did.

Q. Which ones made notes?

A. Well, on at least one occasion I think Mr. Alderman made notes.

Q. Do you remember any other occasions on which Mr. Alderman or any of the other three prosecutors made notes?

A. I don't recall notes having been taken by any other than Mr. Alderman.

Q. Mr. Eckert, other than the CIO statement did you give any of those prosecutors in El Paso anything in writing even though not prepared by yourself?

Mr. Crandall: That is broad, anything in writing.

The Court: I think I will let him answer the question.

A. Mr. Witt, as far as I understand that question that would include a newspaper or anything else?

Q. Anything, Mr. Eckert.

A. I may have given it to them. I don't recall that.

Q. Did you give them anything in writing relating to Jencks?

A. I may have provided some of the Government attorneys with the minutes of the International Executive Board of Mine, Mill & Smelter Workers.

Q. You say you may have, but do I take it from that that you are not sure in your recollection whether you did?

A. No, I am not sure.

Q. Then, would you have any recollection as to what meetings of the International Executive Board of Mine-Mill you may have given them minutes for?

Mr. Vincent: If your Honor please, on the face of it—

The Court: I will sustain that objection. If he did, I assume they are not statements of this witness but are minutes of some other meeting, and to come within the rule they would have to be some statements by him that he subscribed to or approved or something in the language of the statute, and I mean handing him the minutes of a board meeting I do not think would bring the minutes within the purview of the statute.

Mr. Witt: We respectfully differ with your Honor on that. As we read Section 3500—I thought Mr. Kelley agreed with that before—if this man turned over the minutes of a [fol. 387] particular board meeting of Mine-Mill to one of the prosecutors and said, "Here, this is what I know about, I attended this meeting, and I can testify to what took place at that board meeting or some particular incident," as we read Section 3500, that is a statement of this witness.

The Court: The witness hasn't said anything like you state.

Mr. Witt: I cannot put it all in one question.

The Court: The minutes of the meeting may have been entirely opposed to something or some position he took and might have contained the statements of some other individual that absolutely opposed his views, and to say that the simple fact he produced them would bring them under the statute I do not think is right.

Mr. Witt: I cannot put it all in one question. I will try to if your Honor prefers. This is preliminary.

Mr. Kelley: You were just misstating the record up to this time. It wasn't a question of getting it all into one question.

The Court: What was the question?

(The reporter read the last question.)

The Court: You can answer that.

Mr. Vincent: If I might interject here, I think we are under a misunderstanding from what Mr. Witt said about a written statement. The definition in the statute is a written statement made by said witness and signed or otherwise adopted or approved.

The Court: That is what I thought. The only possible conception that any part of the minutes would be admissible, would come within the category would be if the minutes would show a statement made by the witness and he said, "This is what I said and this is still my view on the thing," it might possibly come within the statute, but, otherwise, it would not apply to minutes or anything else. [fol. 388] But he can answer that question if he can recall which was about what meetings or what meetings the minutes are of.

A. I may have supplied the Government's attorneys with a bound volume containing the minutes of the International Executive Board for a period from beginning sometime in 1945 or 1946 until sometime in 1948. I may also have given them the Casting Division Council minutes covering the same periods.

Q. When you may have given the prosecutors that material, Mr. Eckert, did you point out anything specific in that material you could testify about?

A. I don't recall whether, I don't recall whether I gave it to them or not, so, I cannot recall whether I pointed anything out.

Q. After you may have given them this material, Mr. Eckert, did they ask you any questions about any of the material which you may have given them?

A. I don't recall whether I did or not.

Mr. Kelley: That is immaterial.

The Court: He has answered the question.

Q. Mr. Eckert, after you talked to any of the attorneys did they or any of them come back with a document in writing which they showed you?

A. Can I have that question repeated, your Honor?

The Court: All right.

(The reporter read the last question.)

A. No.

Q. Did any of them come back with any recording of transcription of your interviews with them relating to Jencks?

A. No.

Q. After you talked to any of them did they ask you to sign any statement which they prepared or had prepared?

A. No.

Q. Now, Mr. Eckert, I will ask you about the occasion on which you testified against Gold before the Grand Jury in Washington, D. C. My first question is whether you talked to any of the attorneys representing the Government either in Washington or elsewhere before you went before that Grand Jury about the meeting early in 1948 in New York attended by you, Travis, Gold, and others about which you testified in the course of your direct examination on this trial.

[fol. 389] A. I don't recall which meeting you are referring to that I testified to here on direct examination.

Q. Well, Mr. Eckert, I am referring to the meeting you testified to on direct examination here held in New York City early in 1948 that I think you said was at a trade union center about which you also testified later in open court, and I say later, after you testified before the Grand Jury in Gold, about which you also testified in open court on the trial of Ben Gold. Do you know the meeting now?

A. Yes.

Q. All right, sir, then answer my earlier question as to whether you discussed that meeting with the Government attorneys before you testified against Gold before the Grand Jury in Washington, D.C.?

A. My recollection is that I did.

Q. And where was that?

A. I am not sure.

Q. What city?

A. Some in Washington. I think there was a meeting in Detroit. I am not sure about that.

Q. You say some in Washington?

A. Yes.

Q. Then you talked to an attorney or attorneys representing the Government on more than one occasion about that matter in Washington, D. C., before you testified before the Grand Jury?

A. Yes.

Q. Do you remember the names of the attorney or attorneys?

A. The attorney I recall was Mr. Lowther.

Q. Joseph Lowther who was the prosecutor on the trial later?

A. Yes.

Q. He was the only attorney you talked to representing the Department of Justice about that matter?

A. I don't recall whether he was or not.

Q. Did you give Mr. Lowther any document in writing whether prepared or signed by yourself or any other document?

A. My recollection is that I did.

Q. I take it you gave him a copy of your statement before the CIO?

A. I think that was included.

Q. Anything else in writing that you gave Mr. Lowther dealing with that meeting in New York?

The Court: By statement you mean the testimony of the CIO hearing, is that what you meant?

The Witness: Yes.

The Court: All right.

[fol. 390] Mr. Witt: I am referring to statement rather than testimony, your Honor, because it is an unofficial proceeding.

Q. Do you remember the pending question, Mr. Eckert?

A. Yes. I don't recall whether any other material was given him that referred to that particular meeting.

Q. When you talked to Mr. Lowther, I am actually talking about the times you saw Mr. Lowther about this matter, prior to your testifying before the Grand Jury, did you tell him that you attended that meeting in New York?

A. Your last question has got me confused in regard to whether the previous question was before the Grand Jury or before the trial.

Q. I am sorry. I will begin again. In this whole series of questions, until I make it clear I am asking you about something else, I am referring to your conversations with Mr. Lowther prior to your appearing before the Grand Jury.

A. Well, I didn't understand it that way. I understood before the trial.

Mr. Witt: Well, I am sorry, your Honor.

Mr. Kelley: Would it be correct that your answers apply to the period between the time the Grand Jury returned the indictment and the time of trial?

The Witness: Some may. I don't recall all the questions.

Mr. Witt: I had better try to start over again. May I make a general statement to save time so the witness will understand?

Mr. Vincent: How is it material? He has testified that he has spoken to one attorney at least.

Mr. Kelley: It is to Mr. Witt.

Mr. Witt: It is to us.

Q. Mr. Eckert, in the series of questions I am about to ask you, Mr. Eckert, I am referring to conversations with Mr. Lowther or any other Government attorney prior to your appearance before the Grand Jury against Gold in Washington, D.C. Now, I will ask you, to begin with, whether you had any discussion with Mr. Lowther or any other Government attorney about this meeting in New York [fol. 391] in 1948 prior to your testifying before the Grand Jury.

A. I don't recall whether I had a conversation pertaining to that particular meeting with Mr. Lowther prior to the Grand Jury.

Q. Do you recall having some conversation with Mr. Lowther about Ben Gold prior to a hearing before the Grand Jury?

A. Yes.

Q. But you don't recall whether in that conversation you told Mr. Lowther about the fact that Gold was present with you and others at this meeting in New York in 1948?

A. My recollection is that there were no meetings referred to. It was a request to appear before the Grand Jury.

Q. Now—strike that. Did you see Mr. Lowther only on one occasion or on more than one occasion prior to testifying before the Grand Jury?

A. I didn't state that I saw Mr. Lowther. This was a telephone conversation as I recall.

Q. I see. I am sorry. Then you mean you never talked to Mr. Lowther face to face before you testified before the Grand Jury?

A. After I got to Washington immediately preceding the Grand Jury proceedings I did, yes.

Q. But before that he talked to you on the phone?

A. That is my recollection.

Q. Where were you at the time?

A. At that time I am referring to I was in Pittsburgh.

Q. And where was Mr. Lowther, do you know, in Washington?

A. I believe that Mr. Lowther was in Washington.

Q. In the course of that telephone conversation did Mr. Lowther ask you any questions about your attendance with Ben Gold at this meeting in New York early in 1948?

A. I don't recall him asking me that at that time.

Q. Was it Mr. Lowther who called you, or did you call Mr. Lowther?

A. No, Mr. Lowther called me.

Q. And at the ineception of that conversation or at any time duging the course of that conversation did Mr. Lowther advise you that he was making a mechanical recording of that telephone conversation?

A. No, he did not.

Q. Was there only one telephone conversation before you testified before the Grand Jury that you had with Mr. Lowther or was there more than one?

A. One is all that I can recall.

Q. Then, I think you were beginning to say you saw Mr. Lowther face to face when you got to Washington and [fol. 392] talked to him prior to your appearance before the Grand Jury, is that right?

A. Yes.

Q. Did you talk to any other prosecutor?

A. I don't recall having talked to any others unless there was someone else in the room. I don't recall.

Q. Did you talk to Mr. Lowther only once prior to your appearance before the Grand Jury or more than once?

A. Well, in reference to the meeting?

Q. Yes.

A. To the best of my recollection it was just once.

Q. Then, you talked to him only once about this New York meeting in 1948, is that right?

A. To the best of my recollection that's right, prior to the Grand Jury.

Q. We are still talking, until I tell you otherwise, Mr. Eckert, to save time, we are talking about occasions prior to your attendance before the Grand Jury. In that talk with Mr. Lowther did you give him such names as you could then remember of the persons who attended that 1948 meeting in New York?

A. My recollection is that I did not.

Q. You told him, of course, that Ben Gold was there?

The Court: I do not know that you need to answer that question. The question is here about whether he made any statement in that respect, and what the contents were at the moment on the general subject—

Mr. Witt: This has to do with the subject matter of his direct testimony.

The Court: You are not interrogating him about the subject of his testimony. What we are trying to find out is if there is anything that you are entitled to have produced under this rule whatever the contents of it.

Q. Mr. Eckert, do you recall what you did tell Mr. Lowther about this meeting in New York in early 1948?

The Court: You need not answer that question either.

Mr. Witt: Well, your Honor, I am trying to get within the definition of the law.

The Court: You can ask him if he made any statement or I mean signed statement given him like you have with [fol. 393] these other witnesses with respect to the subject of the matter. You are entitled to it under your theory if it comes within 3500 whatever it contains, and the subject he has said he talked about this general subject, but the details of it I do not see where that is relevant at all.

Q. Mr. Eckert, when you talked to Mr. Lowther, this is still prior to your testifying before the Grand Jury, did you give Mr. Lowther anything in writing?

A. I may have given Mr. Lowther these, some of these minutes, documents.

Q. What are you referring to when you say some of these minutes, documents?

A. I am referring to the aforementioned minutes of the International Executive Board, the Die Casting Division. By documents I mean certain Marxian books, textbooks from the Lenin School, other material which was in my possession which I supplied in some of these cases. I don't recall if this was one of them or not.

Q. Well, with respect to those Marxist books you testified on the trial of Ben Gold as an expert, didn't you?

A. Yes.

Mr. Vincent: If your Honor please, that has no relevancy in this proceeding.

Mr. Witt: I want to clear the decks, your Honor, and clear the record on this.

Mr. Kelley: Clear what record, the Gold record?

Mr. Witt: No. In view of his answers I have got to get to my record, Mr. Kelley.

The Court: I do not see where it has any pertinency, but the answer has been made, and proceed, Mr. Witt.

Q. Did you give Mr. Lowther anything in writing relating to the meeting in New York early in 1948?

A. I don't recall having given him anything in writing relating to that meeting other than this CIO statement.

Q. Aside from any written material did Mr. Lowther ask you questions?

A. Yes.

Q. And you answered his questions?

A. Yes.

Q. Did Mr. Lowther have a stenographer present?

A. No.

[fol. 394] Q. Did Mr. Lowther ever show you later after you talked to him a statement based on the answers you had given to his questions?

A. No, he did not.

Q. Did you after the talk with Mr. Lowther sign any statement?

A. No, I did not.

Mr. Witt: Well, your Honor, so that we won't misunderstand each other, I am not going into his testimony before this Grand Jury or any other Grand Juries, because that is a matter we will deal with later.

Q. Now, Mr. Eckert, there came a time when you finally testified in open court against Ben Gold, isn't that right?

A. Yes.

Q. Now, these questions I will ask you from now on relate to the period between your appearance before the Grand Jury and the time you testified in open court against Ben Gold so we will understand each other. During that period did you talk to Mr. Lowther or any other Government attorney or prosecutor about the Ben Gold case?

A. Yes, I did.

Q. Any attorneys in addition to Mr. Lowther?

A. I don't recall any other attorneys.

Q. How many times did you talk to Mr. Lowther during that period?

Mr. Kelley: We will object to that as being immaterial to this inquiry.

The Court: He may answer.

A. Well, I recall several occasions.

Q. What do you mean by several, two or three or seven or eight?

A. I meant two or three.

Q. And in what city or cities did they take place?

A. Well, my recollection is one took place in Detroit, and the remaining in Washington.

Q. On any of those occasions I am asking about here, on any of those occasions when you talked to Mr. Lowther,

and I am still talking about the period between the Grand Jury and the trial, Mr. Eckert, did you give Mr. Lowther anything in writing?

A. None other than matters I previously testified to I may have given him before the Grand Jury. It may have been given to them at this time or it may not have been given to them at all. I don't recall.

[fol. 395] Q. Aside from those other documents you referred to in connection with your answers about your contracts with them prior to your appearance before the Grand Jury there are no other documents you can think of that you gave him in this later period between the Grand Jury and the trial?

A. I don't recall any other documents.

Q. Specifically, do you recall giving him any statement that you, yourself, had prepared and which was either signed by you or unsigned?

A. I don't recall other than there may have been letters in correspondence that I may have turned over to him covering a period that I was in the Mine, Mill & Smelter Workers.

Q. Other than that you don't recall anything else?

A. Other than that I recall nothing else.

Q. After those talks with Mr. Lowther, I am still talking about that same period between the Grand Jury and the trial—strike that. I am sorry, Miss Marson. On those occasions when you talked to Mr. Lowther during that period on any of them was there a stenographer present?

A. There was not.

Q. Was there any mechanical recording device used on any of those occasions by Mr. Lowther?

A. If there was, he didn't tell me about it. I didn't know about it.

Q. After you talked to Mr. Lowther on those accasions did he show you a statement which he asked you to look at?

A. No, he did not.

Q. After those occasions in which you saw Mr. Lowther did you sign anything for him prepared by yourself, by him or anybody else?

A. No, I did not.

Q. All right, Mr. Eckert, you testified yesterday afternoon that you appeared as a witness in the so-called decompliance proceeding before the NLRB. In connection with that I will ask you whether before you took the witness stand in that proceeding you talked to any attorney or any attorneys representing the NLRB.

A. Yes, I did.

Q. One attorney or more than one?

A. I can only recall one.

Q. Do you recall his name?

A. No, I do not.

Q. Was his name Foley?

A. Mr. Foley, that's right.

Q. How many times did you talk to Mr. Foley before you took the witness stand in that proceeding?

A. Several times.

Q. What does "several" mean?

A. One, two or three times or thereabouts. I am not sure.

Q. In what cities, Mr. Eckert?

A. I recall having talked to him in Washington, D. C., [fol. 396] prior to the hearing. I don't recall whether I talked to him in any other city or not.

Q. On any of those occasions when you talked to Mr. Foley about the testimony you would give in that proceeding did you give him anything in writing?

A. None other than the type of material that I have said that I may have supplied in these other proceedings you asked me about.

Q. Tell us more specifically what you mean by the type of material that you referred to, different kinds of material, Mr. Eckert?

A. My recollection is that I did give him the copy of the CIO reports, I may have given him the minutes of the Executive Board and Die Casting Division, I may have given him some of the correspondence in Mine, Mill & Smelter Workers prior to my leaving the Mine, Mill & Smelter Workers, I may have given him some of these books I previously referred to.

Q. So-called Marxist-Lenin classics, Mr. Eckert?

A. Yes, that is the general description.

Q. You testified in that proceeding as an expert, is that right?

A. Yes, I did.

Q. Is there anything else you recall giving Mr. Foley?

A. No, I don't recall anything else.

Q. Did you give Mr. Foley any statement you, yourself, had prepared which was either signed or unsigned by you?

A. None other than any letter that may have been included in that correspondence I referred to.

Q. Was a stenographer present on any of these occasions when you talked to Mr. Foley?

A. No, there was not.

Q. To your knowledge did Mr. Foley use any mechanical recording device or machine?

A. To my knowledge he did not.

Q. Did Mr. Foley make notes during the course of the conversations with you?

A. Yes, he did.

Q. Did Mr. Foley to your knowledge later have those notes written up?

A. Notes written up?

Q. Well, did he have them typewritten later?

A. No, not that I know of.

Q. Yes, to your knowledge. After those conversations with Mr. Foley did he show you anything in writing which he had prepared or which he had had prepared?

A. Well, nothing else other than possibly Government exhibits or something.

Q. Do you remember what those were?

A. No, I don't.

Q. Did you sign anything for Mr. Foley after those conversations?

A. No, I did not.

Q. Now, Mr. Eckert, you testified yesterday that you appeared before a Grand Jury in this court against Travis [fol. 397] in 1954 or 1955. Is that actually your best recollection as to the time, Mr. Eckert?

A. Yes, it is.

Q. Before you appeared before the Grand Jury on that occasion—

The Court: Mr. Witt, I hesitate to interrupt when you are trying to make a record, but it seems to me you could shorten it very much, for instance, here you have got this thing in Colorado, by asking him before the Grand Jury proceedings or before the trial he talked to any attorney rather than taking it in two or three separate installments and then developing what transpired.

Mr. Witt: Well, the problem here is we are talking about four separate episodes with respect to Travis, two appearances before Grand Juries—

The Court: If you ask him if in any of these appearances he talked to any attorney.

Mr. Witt: I will try it, your Honor. Just to get the record straight at this point, the witness has now testified that he appeared before both Grand Juries.

The Court: Yes.

Mr. Witt: Of course, we know he has testified in both trials.

Q. So, Mr. Eckert, as the Court suggested, I am going to ask you general questions about these four occasions. If you have any difficulty following, let us know. Did you talk to any attorney or prosecutor representing the Government before any of these four occasions?

A. Yes, I did.

Q. On every one of the four occasions?

A. Yes.

Mr. Witt: I am afraid we have to go back to the individual ones again.

The Court: That is all right.

Mr. Witt: I wanted to make sure I understood what you said.

[fol. 398] The Court: Ask him who he talked to and ask him when.

Q. I will ask you first your talks prior to your appearance before the Grand Jury the first time, Mr. Eckert. Whom did you talk to?

A. I don't recall who the attorney was at that time.

Q. Was it Mr. Kelley?

A. I don't know whether Mr. Kelley was in it at that time or not. A later time, yes, but I don't recall whether

it was Mr. Kelley I talked to prior to the Grand Jury hearing or not.

Q. Was there only one attorney or more than one?

A. I don't recall which attorneys handled the Grand Jury case on Travis.

Q. Do you recall where it was you talked to the attorney or attorneys, in what city?

A. Well, at least some of the occasions I talked to them here in Denver.

Q. How many occasions in Denver?

A. Well, one or two occasions, possibly more, before the Grand Jury.

Q. Did you talk to the attorney or attorneys in any other city besides Denver prior to your first Grand Jury appearance in this court?

A. I don't recall whether I did prior to that hearing or not.

[fol. 399] Afternoon Session 1:00 p.m.

The Court: You may proceed, Mr. Witt.

KENNETH ECKERT, resumed the stand, and testified as follows:

Cross examination.

By Mr. Witt (continued):

Q. Mr. Eckert, I asked you yesterday afternoon whether you testified before a Grand Jury in this Court a second time. That was after you testified that you had appeared before a Grand Jury against Travis in 1954 and 1955, and I think you said yesterday that you did not recall whether you appeared before a Grand Jury in this court a second time. Based on the discussion in Chambers in which you participated this morning, Mr. Eckert, I want to ask you whether you now recall whether or not you appeared before a Grand Jury in this court a second time.

A. Yes, I do.

Q. And did you?

A. Yes.

Q. Mr. Eckert, on your direct testimony last week you

testified about attending a meeting in Travis's home in Chicago in 1948, and in connection with that I will ask you whether you recall that you were asked the following questions and gave the following answers, page 182: "Question: Now, Mr. Eckert, I would like to ask you whether or not following this meeting you attended a meeting at the home of Mr. Travis. Answer: Yes, I did. Question: And where did Mr. Travis live at that time? Answer: In Chicago. Question: And how long after the New York meeting if you recall was this meeting in Travis's home? Answer: It was shortly after, I don't recall exactly, as near as I can recall a week, possibly two weeks." Do you recall those questions and answers last week, Mr. Eckert?

A. Yes.

Q. Now, I will ask you to look at the transcript of your testimony last week at page 183 and ask you to read to yourself the following question and answer and let me know when you have done that, and then I will ask you a question about that.

A. I have read it.

Q. All right. Now, having read it, Mr. Eckert, do you recall testifying last week that Mr. Harold Sanderson attended that meeting at Travis's home in Chicago in 1948?

A. Yes, I believe I just read that in the transcript.

Q. Mr. Eckert, I will now hand you the transcript of your [fol. 400] testimony before the SACB in Washington on March 27, 1957, and ask you to read to yourself the questions and answers about that meeting in Travis's home in Chicago in 1948, and when you have finished reading it to yourself I will ask you a question about that testimony. I suggest, Mr. Eckert, you begin with the second question on page 1023.

Mr. Witt: Is that appropriate, Mr. Kelley?

Mr. Kelley: Yes. I just had one question about it that I would think we can approach the Bench on.

(Conference at the Bench.)

In Open Court

Q. Do you remember my suggestion, Mr. Eckert?

A. Yes.

Q. You begin with the second question on page 1023 and read through your answer to the question as to whether you recall who was present at the meeting. Read it to yourself, Mr. Eckert, first.

A. I have finished reading it, Mr. Witt.

Q. Mr. Eckert, it is true, isn't it, that when you testified on that occasion before the SACB as to who was present after you named four people by name you added, "These are the people I can remember." That is true, isn't it?

A. Yes.

Q. I will ask you whether Harold Sanderson was one of the four people whose names you gave as being present at that meeting when you testified before the SACB.

A. Apparently from the record he was not one of those I named as being present.

Q. Mr. Eckert, I will now hand you the transcript of your testimony on the first trial against this defendant, this being the transcript of testimony you gave on December 1, 1955, and I will ask you to read to yourself again your testimony about the same meeting at Travis's beginning with the second question from the bottom on page 267 and reading as far as you need to on page 268 so you will refresh your recollection as to who you named as being present at that meeting when you gave that testimony.

A. How far shall I read, Mr. Witt?

Q. Until—I thought I suggested to you, Mr. Eckert, maybe I didn't make myself clear, until you are satisfied you are finished reading the testimony you gave as to who was present at that meeting.

A. Well, I think I read far enough for that.

Q. Then, if there is any question, Mr. Eckert, satisfy [fol. 401] yourself before I ask you my question.

A. I don't know what follows in the transcript, Mr. Witt.

Mr. Witt: Then, if the prosecution, if there is any problem, can take care of it on the redirect if the witness has any doubt.

Q. I will ask you having read the testimony you gave on the first trial, again, of the defendant whether Harold Sanderson was one of the names you gave as being one of those present at that meeting in Travis's house in Chicago in 1948.

Mr. Kelley: Before he answers, may I ask, does that question include on direct examination only?

Mr. Witt: Only on direct is the only matter I have asked him to read, your Honor, and ladies and gentlemen.

A. As far as I can read in the record his name had not been mentioned to that point.

Q. Mr. Eckert, do you recall when you were testifying on direct examination last week Mr. Kelley asked you how your membership in the Communist Party was terminated?

A. I recall a question of that general nature, yes.

Q. And you recall your answer that your membership was terminated by expulsion?

A. Well, that is the way it was terminated, and to my recollection that is the way I answered it.

Q. Now, Mr. Eckert, I will ask you in connection with that testimony about your expulsion from the Communist Party, did you receive any written notification from the Communist Party that you had been expelled from the Party?

A. Yes, I read written documents that I had been expelled.

Q. What written documents did you read?

A. An article in the Communist Daily Worker and a leaflet issued by the Ohio State Communist Party to various Mine-Mill plants, the workers in those plants stating that I had been.

Q. And let me ask you my question again and perhaps make it a little clearer: Did you receive any personal notification by letter or telegram, any personal notification in writing from the Communist Party that you had been expelled?

A. I don't recall any such notification.

Q. Didn't you testify last week on that subject that you [fol. 402] read about your expulsion?

A. I read about it all right.

Q. And when you gave that answer last week you were referring to what you said a moment ago, you read about it in the Communist Daily Worker and in these weeklies that were distributed, is that right?

A. I read it in those documents, yes, possibly others too.

Mr. Witt: If the Court please, your Honor will recall that we objected to this question last week which now appears on page 243 about how his membership was terminated, and when he answered by expulsion, and the reason we did it, your Honor, was because a minute or two before, and this appears at page 242 from which I just read to the witness, he said he read about his expulsion, and the basis for our objection was that his answer that he was expelled that he gave at page 243 was based on hearsay as his early answer indicated. Now, in light of the witness's answers to me now on cross examination I beg leave to return to that issue and move now that the witness's answer on page 243 that his membership in the Party was terminated by expulsion be stricken and the Jury be instructed to disregard that answer.

The Court: The motion will be denied.

Q. Mr. Eckert, you remember last week more or less at the beginning of your cross examination by Mr. Kelley after he had asked you whether you had ever been a member of the Communist Party of the United States he asked you when you became a member, and you answered, "Well, sometime back about 1931 is as close as I can recall," do you remember that answer?

A. Yes.

Q. Mr. Eckert, do you recall making a statement to the FBI at any time about when you first joined the Communist Party?

A. I believe that I did make such a statement to the FBI.

Q. And when was that that you made such a statement?

A. I don't know.

Q. Was it in 1948?

Mr. Vincent: I object to that, the witness has answered that question.

Mr. Witt: I am trying to refresh his recollection.

The Court: I think I will sustain the objection. I think, if you have anything contradictory, you can ask him what-[fol. 403] ever the fact is. If your material would indicate, you can proceed on that basis.

Mr. Witt: All right. I am used to the other procedure, and I will overcome my ingrained habits.

The Court: I think the question is, did you not state the time and place was such and such a thing and let the witness answer.

Mr. Witt: I think we can make it even shorter.

Q. I will now show this witness the document which I have related to Mr. Kelley about being one of the documents your Honor gave to the defense after production by the prosecution.

Mr. Kelley: I want to object to the use of this document for the purposes of impeachment for the reason that this is a hearsay statement and not the statement of the witness.

The Court: No, I think we will get to that. I think he can ask him the question whether he made that statement, whatever it is, and then the witness can answer yes or no. If he denies he made the statement, then we will get to the point you are making.

Mr. Witt: I am astonished at this objection, your Honor, because this statement is the only one that this man has said that he made in his own handwriting and the photostated copy of which statement is in this man's own handwriting that Mr. Kelley delivered to us yesterday.

Mr. Kelley: I do not know whether it was in his own handwriting. I wasn't aware that this was the signed statement. Is this the one that was the signed statement?

Mr. Witt: This is the one, Mr. Kelley, and it is signed, the photostatic copy of the original.

The Court: I think you can proceed and ask him the question.

Mr. Kelley: I withdraw the objection.

The Court: I think the objection is withdrawn. Ask him [fol. 404] the question that you wish.

Mr. Witt: All right, I will then show him the photostatic copy of his own handwritten statement or at least a statement by him. I direct his attention to the beginning of the third paragraph on the first page.

The Court: I think you can ask him, Mr. Witt, ask him if he didn't make the statement.

Q. Mr. Eckert, I ask you to look at this and ask you whether you didn't make the following statement under date of—

Mr. Kelley: We do not have our copy of this. I wonder if we could have just a minute.

Mr. Witt: I can give you the typewritten copy or the photostatic copy of the handwritten original. Do you want this one or this one?

Mr. Kelley: I want to get our own.

Mr. Witt: This is the one we received from you. Do you doubt it, Mr. Kelley?

Mr. Kelley: No, I do not.

The Court: How long will it take?

Mr. Kelley: He can go ahead.

Mr. Witt: I do not want to be interrupted this way. I will wait for Mr. Kelley to get the statement.

The Court: We will wait until he gets the statement.

Mr. Kelley: May it please the Court, he can proceed. We will use the typewritten copy instead.

The Court: Then, you may proceed, Mr. Witt. I think you had better restate your question so that it will be clear. With this interruption the witness may not be clear.

Q. Mr. Eckert, in this statement in your handwriting or [fol. 405] somebody's handwriting dated May 22, 1951, did you not state or did you not at least sign that statement and agree to it, and this is the third paragraph on the first page of the photostatic copy of the handwritten statement, "While living in Toledo, Ohio, during the early part of 1932 I joined the Communist Party after having been active in the Union Employment Council"?

A. What do you want me to read, Mr. Witt?

Q. Just that sentence I just read to you, look at that, and see if that conforms to what I just read.

The Court: Well, the question is, I think to save a lot of confusion, simply to ask him if he did or did not make that statement at that time, and he will answer yes or no.

Q. Did you or did you not make that statement at that time, answer yes or no, Mr. Eckert?

A. I believe this is the statement I signed about that time.

Q. Mr. Eckert, I will now read you questions and answers in the course of your testimony on direct examination during the first trial against this defendant on November 30, 1955. This is from page 125: "Question: Mr. Eckert,

are you now or have you ever been a member of the Communist Party? Answer: Yes. Question: And when did you first become a member of the Communist Party? Answer: About 1931." Do you recall those questions and those answers?

A. I recall questions of that general nature. I do not recall what was said other than the transcript there.

Q. Now, still referring to your testimony on the first trial against this defendant, Mr. Eckert, but this time under cross examination in that trial, testimony you gave on December 5, 1955, this is at page 318, I will ask you whether you recall the following questions and answers: "Mr. Eckert, when according to your testimony in this case did you join the Communist Party? Answer: I joined the Communist Party to the best of my recollection in 1931 or possibly 1930. Question: Or possibly 1930? Answer: It is possible, yes." Do you remember those questions and answers?

A. I don't remember the testimony, Mr. Witt, but—

Q. I will ask you now, Mr. Eckert, to tell the ladies and gentlemen of this Jury according to your present best recollection whether you joined the Communist Party in 1930, whether you joined the Communist Party in 1931, or whether you joined the Communist Party in 1932.

A. To the best of my recollection I joined the Communist [fol. 406] Party about this period that has been referred to. I do not remember the exact year that I joined the Communist Party.

Q. Mr. Eckert, why did you tell the ladies and gentlemen of this Jury when Mr. Kelley asked you a question about that on your direct examination last week that you didn't remember quite what year it was?

Mr. Kelley: The Government objects to that as argumentative.

The Court: I will sustain the objection.

Q. Mr. Eckert, I will ask you whether you recall last week on direct examination giving the following answers to the following questions about the meeting in Chicago early in 1946 at which the so-called Steering Committee in Mine-Mill was organized, page 92, "Question: Will you

state what the Steering Committee was? Answer: The Steering Committee was a committee designated by the Communist Party to coordinate the work of the Communist Party inside the Mine, Mill & Smelter Workers. Question: Now, did you state about when the Committee was organized? Did I ask you that? Answer: Yes. Question: I missed the answer. Will you repeat it, please?" The Court then said: "He said in 1946. Answer: I said that was my best recollection, early in 1946." Then, with permission of the prosecution I will skip.

The Court: I think you interrogated him about that yesterday, didn't you?

Mr. Witt: Just on one aspect of it. This is another aspect of it. We will get to it another way. With the permission of the prosecution I will skip to the bottom of the page, because the intermediate material is irrelevant, and go to the last question at the bottom of page 92: "Question: Do you recall who was present at the time the Committee was set up? Answer: Well, some of the people present were John Williamson, Gil Green, Maurice Travis, Chase Powers, Al Skinner, Mr. Fred Fine, a Mr. Sanderson, Harold Sanderson were among those attending that meeting." Now, you remember those answers of yours to those questions particularly this last one about who you recall attended that meeting?

A. I remember giving that answer along that line.

Q. Now, Mr. Eckert, I will read you from your testimony on the first trial particularly with respect to the people you named as attending that same meeting beginning at the bottom of page 223: "Question: Now, was there a meeting [fol. 407] held by anyone at which either, well, at which you and the defendant Travis were present in connection with the organization of the Steering Committee? Answer: Yes. Question: And where did that take place? Answer: To the best of my recollection the formulization of the Steering Committee, its official creation took place in Chicago. Question: And that would have been what period of time? Answer: Well, sometime in the forepart of 1946. Question: Who was present at that meeting? Answer: Well, Maurice Travis, Chase Powers, Al Skinner, myself, Gilbert Green,

Fred Fine. There may have been other Communist Party members from the Mine-Mill office present. I don't recall." Do you recall those answers with respect to who was present and those you named?

A. No, Mr. Witt, I don't remember the people that I may have remembered at that particular time and stated who were there.

Q. I didn't ask you that, Mr. Eckert. I ask you whether you recall giving those answers on the first trial against this man Travis and particularly whether you remember naming those particular people I read to you.

A. No, I can't remember the questions and answers propounded here in these various trials including this one.

Q. Now, Mr. Eckert, John Williamson was a pretty important fellow in the Communist Party, wasn't he?

Mr. Vincent: The Government objects to that question, your Honor.

The Court: What is the objection?

Mr. Kelley: We will withdraw the objection, your Honor.

The Court: You may answer.

A. Well, he thought he was.

Q. Did you think he was when you were a fellow Communist with him?

A. No, I thought he was a dope.

Q. But you testified here on other occasions that he was the National Trade Union Secretary of the Communist Party, right?

A. Yes, but still a dope.

Mr. Witt: I move to strike that answer again and suggest that your Honor direct the witness to stop being silly.

[fol. 408] The Court: Well, I think I will strike that last part of the answer.

Q. I will ask you again—

Mr. Witt: I am sorry, your Honor.

The Court: He has answered your question, hasn't he?

Mr. Witt: Yes.

Q. And in your testimony against Travis on the first trial you had occasion to refer to John Williamson, didn't you?

Mr. Kelley: Well, that question is pretty vague.

The Court: I will sustain the objection to the form of the question.

Mr. Witt: I will withdraw that.

The Court: All right.

Q. Mr. Eckert, on the first trial against Travis you gave testimony about the meeting in New York early in 1948 attended by you and Travis and John Williamson and others which you testified about here last week, didn't you?

A. Yes.

Mr. Kelley: Excuse me, Mr. Witt, but, as I understand, this is deviating from the procedure that we agreed in Chambers would be followed, isn't it?

Mr. Witt: No, your Honor.

The Court: Proceed.

Mr. Witt: This is just confronting the witness, that is all. I am entitled to go ahead and draw any conclusions if it is competent otherwise.

The Court: He said he was at the meeting. What is the next question?

Mr. Witt: The point I am asking him, if I may, your [fol. 409] Honor, I am not sure that it came out clearly for the Jury.

Q. Mr. Eckert, you did mention Mr. Williamson's name in connection with that meeting in New York early in 1948 when you testified on the first trial against Travis, didn't you?

A. Well, Mr. Witt, I remember Mr. Williamson being there. I don't remember the questions and answers in these various proceedings.

Q. Mr. Eckert, I will read you the following question and answer from your testimony on the first trial and on direct examination on December 1, 1955, page 261 about who was present at that meeting in New York City in 1948: "Question: Now, will you tell us who else was present at this meeting, and when you do, if you would—it might save some time—if you would tell us who they were at the time. Answer: John Williamson, National Trade Union Secretary of the Communist Party; Eugene Dennis, General Secretary of the Communist Party of the United States," et

cetera and et cetera. You can look at the rest of the answer. I will ask you whether that refreshes your recollection when you testified about that meeting in New York during the course of your testimony on the first trial, whether that refreshes your recollection that John Williamson was the first name you mentioned among the people who attended that meeting?

A. That is the first name in the record here.

Q. Now, I will ask you whether you can explain for the ladies and gentlemen of the Jury why it is that even though you gave that testimony naming John Williamson on the first trial, why when you gave your testimony on the first trial about the organization of the Steering Committee you didn't tell that jury that Williamson was present and why it is that when you testified here last week on direct examination about the organization meeting of the Steering Committee you mentioned that John Williamson was present.

Mr. Kelley: The Government objects to that for the reason it is unintelligible, and, if anybody can figure it out, I think it is irrelevant and improper type of question.

The Court: I think it is argumentative at least. I do not quite understand—

Mr. Witt: I withdraw the question, your Honor.

The Court: All right.

[fol. 410] Q. Now, with respect to the same testimony about the organization of the Steering Committee which you gave last week you will recall from our reading of it a few minutes ago that in your direct testimony last week you testified that Harold Sanderson attended that meeting. Do you recall that?

A. I recall him attending.

Q. Do you recall just a few minutes ago when we read those names from your testimony last week you testified last week that Harold Sanderson attended?

A. I have trouble remembering your last question to say nothing of questions going back before the last one.

Q. How come, Mr. Eckert, you seemed to have so little difficulty last week?

Mr. Kelley: May it please the Court, the Government objects, he knows this question is improper.

The Court: Any comments you have to make, Mr. Witt, will be as argument to the Jury and not argument with the witness.

Mr. Witt: I withdraw the partial question I asked.

Q. I direct your attention again to page 92 of your transcript of testimony last week and ask you to look at it again at the very bottom of the page and go over to the next page, 93, and ask you if that doesn't refresh your recollection that last week you said that Harold Sanderson attended that meeting, that organization meeting of the Steering Committee.

Mr. Kelley: May it please the Court, this has already been gone into, the questions have been asked and answered on this.

Mr. Witt: Not on Sanderson. I did on Williamson, and I did yesterday on Powers, but I haven't done it yet on Sanderson. All we can do is take one name at a time of the scores of names this man has mentioned.

The Court: He can answer the question.

A. Sanderson was at the meeting.

Q. Answer my question, Mr. Eckert.

Mr. Witt: Your Honor, I move to strike that answer and ask you to direct the witness to answer the question which [fol. 411] is whether the reading of that transcript refreshes his recollection that he testified last week that Sanderson was at the meeting.

The Court: I think he has answered the ultimate fact. If you want to ask him when he testified on that occasion if he didn't mention Mr. Sanderson's name, if you wish to ask him that, do so.

Q. All right, I will ask you, Mr. Eckert, if you gave this answer last week as to who was present at that meeting of the Steering Committee which was organized in Chicago in 1946: "Well, some of the people present were John Williamson, Gil Green, Maurice Travis, Chase Powers, Al Skinner, Mr. Fred Fine, a Mr. Sanderson, Harold Sanderson were among those attending that meeting." Does that refresh your recollection that when you testified last week you said a Mr. Sanderson, Mr. Harold Sanderson was among those present at that meeting?

A. Mr. Witt—

The Court: I do not get the point to this. Where is the alleged contradiction?

Mr. Witt: The alleged contradiction, your Honor, if you followed the names he mentioned when he testified about this on the first trial, is that he did not mention Sanderson among those present on the first trial.

The Court: And he did on the second trial?

Mr. Witt: That's right.

The Court: Let it stand there then if that is the fact.

Mr. Witt: That is the fact as of this point. If it is not the fact, the prosecution has the normal right of redirect examination.

Q. I will still ask you the question, is your recollection now refreshed that when you testified about this meeting last week you said a Mr. Sanderson, Harold Sanderson was among those present?

A. I have no doubt hearing the transcript that I testified to that. If I was fresh in my memory, I don't even know what it means.

[fol. 412] Mr. Witt: May we approach the Bench on a matter independent of the examination which has just come to my attention in the Courtroom, your Honor?

(Conference at the Bench.)

In Open Court

Q. Mr. Eckert, do you recollect testifying last week on direct examination about a meeting that was held in Chicago, Illinois, in 1946, at a restaurant called the Russian Cooperative Restaurant?

A. Yes, I believe I testified about such a meeting.

Q. And do you recall that Mr. Kelley asked you the following question and you gave the following answer, page 136: "Question: Now, at this meeting will you state some of those who were present? First, let me ask you this question: About how many attended that meeting? Answer: To the best of my recollection there must have been, I think there was 75 or more, maybe slightly less, around that figure." Do you remember giving that answer to that question last week?

A. That sounds like it.

Q. Mr. Eckert, do you recall being asked questions about this meeting by Mr. Broome, counsel for the Attorney General when you testified before the SACB?

A. No, I don't remember whether Mr. Broome asked me that question or not.

Q. Mr. Eckert, I will read you the following question and answer with respect to that matter from the transcript of your testimony before the SACB on March 27, 1957, page 936: "Question: Let's take up the meeting at the Russian Cooperative Restaurant. Just how large a meeting was that, Mr. Eckert? Answer: Well, my estimate would be that there were 100 or somewhat more at that meeting." Having heard that do you recall that you gave that answer to that question in Washington last year?

A. I don't recall whether I gave it, but, if it is in the transcript, I must have given it.

Q. Can you explain for the benefit of the ladies and gentlemen on the Jury how it is that in 1957 your recollection was that there were 100 or more at a particular meeting and in 1958 the number shrinks to 75 or thereabouts or maybe less?

Mr. Kelley: The Government objects to that as argumentative.

The Court: I think I will let him answer although I do not think the question is in the terms of what the witness [fol. 413] answered. What was it he said about the 75?

Mr. Witt: I have it here in front of me. He said 75 or more, maybe slightly less, around that figure, and before the SACB he said 100 or somewhat more. Well, it doesn't matter. We do not have to waste time. I will withdraw the question if the Court permits me.

Mr Kelley: We have no objection to his withdrawing the question.

The Court: All right.

Mr. Witt: May we have this off the record for a moment, sir?

(Discussion off the record.)

Q. Now, Mr. Eckert, with respect to the same meeting, this what I will call, if you understand me, I think the ladies and gentlemen of the Jury will, what I will call the

Russian Cooperative Restaurant meeting I will read you the answers you gave to the following questions last week on direct examination as to the particular persons who attended that meeting, page 136: "Question: Will you tell me some of those who were present? Answer: The members of the Steering Committee, Maurice Travis, Chase Powers, Al Skinner, and myself, Harold Sanderson, Bernard Stern, Leon Gorelick, Irving Dichter, Alex Berlint, William Gately; these are some of the names that I can recall at the moment." Now, you remember mentioning those names in answer to the question last week?

A. Yes, I believe those are some of the names I mentioned.

Q. Some of the names you mentioned last week?

A. Some of the people that attended, that I mentioned last week.

Q. Mr. Eckert, I will read you your answer to the question as to the people who attended that same meeting at the Russian Cooperative Restaurant meeting, the answer you made when you testified against Travis on the first trial: "Question: Well, can you name some of the top ones who were the leaders at this meeting? Answer: Maurice Travis, Chase Powers, Al Skinner, Irving Dichter, Al Balint, myself, Harold Sanderson, Howard Lee, well, many others." Do you remember that answer to that question?

A. I remember a question and answer generally along that line.

[fol. 414] Q. Now, Mr. Eckert, I will read you from the same page of the SACB testimony of yours last March from which I read you before, page 936 after you estimated about how many attended the meeting, the bottom of page 936: "Can you give us the names of some of them, as many as you can recall at the present time, who attended?"

Mr. Witt: There is no doubt, your Honor, and ladies and gentlemen of the Jury, from the record this is the same meeting at the Russian Cooperative Restaurant. I don't think there is any dispute.

Q. "Answer: Well, starting with the members of the Steering Committee, they were all there, Harold Sanderson, Morris Wright, Irving Dichter, Alex Balint, Herman Clott,

James Pinta, a fellow by the name of Schnaittacher, a staff member from the West Coast. Jack Marcotti, Leon Gorelick, and many more whose names I don't recall." Do you remember mentioning those particular names before the SACB?

A. I don't remember mentioning them, but I remember their being there now refreshing my memory on it.

Q. Mr. Eckert, in connection with your testimony last week on direct examination in this trial you testified about a meeting of the Steering Committee at the Hollenden Hotel in Cleveland during the 1946 convention of Mine-Mill, and in connection with that you asked a question about a particular Steering Committee meeting held at that time in that place, page 140.

Mr. Witt: Well, I think to get a little continuity in this I had better begin at the bottom of page 139.

Q. "Question: Do you recall about when the convention was held in Cleveland? Answer: My recollection is the early fall of 1946. Question: At about the time the convention was held were there any Steering Committee meetings? Answer: Yes. Question: And do you recall any that occurred immediately prior to the convention? Answer: Yes. Question: Do you recall where this particular Steering Committee meeting was held? Answer: The first one that was held prior to and during the convention, my recollection is it was in the Hollenden Hotel in Cleveland. Question: Now, who was present at that meeting? Answer: John Williamson, Maurice Travis, Powers, Skinner, and myself. I think Harold Sanderson was there. There might have been a few others, but that is all I can recall." Do you remember those answers you gave to those questions last week particularly that last answer as to who was present? [fol. 415] A. I remember it in a general way. I don't know what you mean by "particularly that last part". Which part is that?

Q. I mean that last answer you gave where you named John Williamson and other people, whether you remember stating those names on this witness stand last week.

A. John Williamson and who else?

Q. I am sorry—

Mr. Kelley: "—Maurice Travis, Powers, Skinner, and myself. I think Harold Sanderson was there. There might have been a few others, but that is all I can recall."

A. They were all there.

Q. I didn't ask you that, Mr. Eckert. I asked you whether you recall that that is the testimony you gave last week about who was there.

A. I have no doubt that is the testimony. I don't recall whether I gave it or not.

Q. Mr. Eckert, I will now read you the following answers which you gave to the following questions when you testified about this meeting or a meeting, if there is a different meeting, at the Hollenden Hotel in Cleveland in 1946: "Question: Now, at about this time or during this period do you recall the conversation at which the defendant Travis was present and a man by the name of Williamson which occurred in Cleveland and the subject matter of which related to the source of direction of Communist policy in Mine-Mill? Answer: Yes. Question: When with reference to this last conversation or wherever else you may place it more specifically did this conversation occur? Answer: It was held in the Hollenden Hotel in Cleveland and immediately prior to the 1946 convention of the Mine, Mill & Smelter Workers. Question: Now, will you state those that were present at this conversation? Answer: John Williamson, Maurice Travis, myself, Al Skinner. I don't recall whether Chase Powers was present at this particular conversation or not. He was at the others." Now, do you remember—

The Court: The first question was, who was present in the meeting. Now, you are asking who was present at a conversation. That would not necessarily be contradictory. There may have been a meeting, and the question you are just reading has to do with a conversation, not the meeting.

Mr. Witt: No, your Honor. That is true in terms of the language this man used last time and uses this time.

[fol. 416] Mr. Kelley: Wait a minute.

Mr. Witt: Just a moment, let me finish answering the Court's question. May I?

Mr. Kelley: Go ahead.

The Court: Proceed.

Mr. Witt: It is true that on the first trial he referred to it as the conversation.

The Court: Those are two different things. There may be 20 people at a meeting, and, if you ask about a conversation at the meeting, there may have been only two people there. You are not talking about the same thing is the point I am making.

Mr. Witt: Your Honor, I think further argument on my part before the Jury would be improper. May I suggest we pass this now since we are about to recess in a few minutes, and perhaps we can spend a few minutes in Chambers about it?

The Court: He need not answer the question. You can proceed to something else.

Mr. Witt: Yes.

Mr. Kelley: May it please the Court, I think it would be well to correct the record, because counsel has again characterized the testimony of this witness, he said something about this witness used different language last time than he did this time. The different language was in the questions.

The Court: In the questions, that is very obvious.

Mr. Witt: That may be. If Mr. Kelley or the Jury understood me to be characterizing the witness, I didn't intend to.

The Court: It is just this simple it seems to me: The question in one case was, who was present at the meeting, and the question in the other case was, who heard the conversation.

Mr. Witt: Since your Honor is pursuing it, I think it is fair that we say to your Honor that we will be able to [fol. 417] show that even though one place the interrogator referred to it as a conversation and on this trial they referred to it as a meeting, we will be able to show that it was the same incident and exactly the same thing took place with the same people saying the same things, but that is what I want to save for Chambers.

The Court: All right.

Q. Mr. Eckert, in connection with your testimony last week about a meeting which was held in the Communist

Party office in Chicago prior to the meeting at Henry Horowitz's in 1947 I will read you the following questions and your answers to them: "Question: Now, I believe you stated that there were two meetings of the Steering Committee in Chicago prior to the 1947 convention in St. Paul. Do you recall when in reference to the time of the Horowitz meeting the other meeting occurred? Answer: There had been another meeting prior to the meeting in the Horowitz house in the Communist Party Office in Chicago where these matters had been discussed and decision made there to call what we called at this time an enlarged—" And then the witness's answer was stopped by an objection and sustained by the Court, and then at the bottom of the page the interrogation picks up again: "Question: At this meeting in the Communist Party headquarters will you state who was present there? Answer: Maurice Travis, Gil Green, Fred Fine, Al Skinner, myself, Harold Sanderson. I don't recall whether the other member of the Steering Committee, Chase Powers, attended that meeting or not." Now, do you remember those answers of yours to those questions and particularly the last one in which you named those who were present and said you don't recall about Chase Powers?

A. I am not even sure at this point which meeting you are referring to.

Q. I just read it to you, Mr. Eckert. This is the meeting you testified about last week, you can look at it if you want to, which you said took place at the Communist Party headquarters in Chicago in 1947 prior to the meeting at Henry Horowitz's which was prior to the St. Paul convention.

A. I have finished reading this, Mr. Witt.

Q. I beg your pardon, Mr. Witness?

A. I have finished reading this section.

Q. Do you know what witness you were talking about in that testimony?

A. What witness I am talking about?

Mr. Witt: I am sorry. I am too fatigued. I am going [fol. 418] to have to ask for a recess. Let me finish this if I may.

Q. Now, do you remember what meeting you testified to about at this point?

A. Yes, I have in mind the meeting that refers to.

Q. I will ask you again whether you recall last week in connection with that meeting you said these people were present you named here.

A. Well, I said it. It is in the transcript.

Q. Now, Mr. Eckert, I will ask you to listen to the following answers you gave to the following questions when you testified on the first trial against Travis on December 1, 1955, about that same meeting, page 245. If you have any question, it is the same meeting you speak about, Mr. Eckert. "Question: Now, I ask you if prior to this meeting at Horowitz's house whether or not there had been a Steering Committee meeting at which the program of policy or the course the discussion was to take at the Horowitz meeting was named. Answer: Yes. Question: Who was present at that time? Answer: Gil Green, Fred Fine, Maurice Travis, myself, and Al Skinner. Question: Where was this meeting held if you recall? Answer: In the Illinois Communist Party Headquarters in Chicago. Question: And now was this immediately prior to the Horowitz meeting? Answer: Yes." And then I will ask you whether you recall that answer in the course of your testimony on the first trial in which you named Gil Green, Fred Fine, Maurice Travis, and Al Skinner.

Mr. Kelley: Was that the transcript of the first trial or this trial?

Mr. Witt: The first trial. I finished earlier with the second trial.

A. I remember questions and answers along that line, but I am not sure which Horowitz meeting you are referring to though.

Q. You are not clear whether that testimony of yours I referred to on the first trial was the same meeting at the Communist Party Headquarters as you testified to about here last week and which testimony I read you a few minutes ago, you have doubt whether that is the same meeting?

Mr. Kelley: I think he was referring to the one at the Horowitz meeting. He is back at the Communist Party Headquarters now.

The Court: No, the first one was at the Communist Party Headquarters, and the witness has expressed some uncer-

[fol. 419] tainty as to whether the one you just read here was the same meeting he was talking about here on the direct examination on this trial.

Mr. Witt: There may be some confusion here, but I think I am clear on it, so, I think we should have our recess now, and we will try to clear it up when we come back.

Mr. Kelley: May it please the Court, the question arose just slightly before recess in reference to the testimony of the witness on two prior occasions, one being at the first trial of this case in reference to a conversation in Cleveland at the Hollenden Hotel in which we refer in the questions to who was present at the conversation or some such context which appears along about page 230 of Volume II, and in the present trial on direct examination the same incident was inquired into but was referred to as a meeting rather than a conversation, and for purposes of clearing the record I make that statement.

The Court: Then, as I understand, when the word "conversation" was used in the first trial it was synonymous with "meeting" and had the same effect as "meeting"?

Mr. Kelley: That's right, your Honor.

The Court: And that the question in reality propounded on both occasions was who was present at the meeting, is that right?

Mr. Kelley: Yes, sir.

The Court: Does the witness understand it on that basis?

The Witness: Yes, sir.

The Court: Then, the witness will be permitted to answer that last question. You can either restate it or go back to it in the record about his testimony at the first trial.

Mr. Witt: Thank you, Mr. Kelley and your Honor.

Kenneth Eckert, resumed the stand, and testified as follows:

Cross examination.

By Mr. Witt (Continued):

Q. I am not sure, but just to get a little continuity for the [fol. 420] witness and the Jury, I am referring now, Mr. Eckert, to your testimony on the first trial, Volume II, on

December 1, 1955, at page 229 and ask you whether you recall giving the following answer to the following question: "Question: Now, will you state who was present at this conversation? Answer: John Williamson, Maurice Travis, myself, Al Skinner. I don't recall whether Chase Powers was present at that particular conversation or not. He was at the others." I will ask you whether you recall that answer.

A. Yes.

Q. Mr. Eckert, I now refer you to your testimony last year before the SACB on March 27, page 942, the third question from the bottom, and ask you to listen to the answers you gave to the following questions: "Question: Now, I started to ask you about the convention of 1946. Was there a meeting of the Steering Committee prior to the meeting of the convention? Answer: There were a series of such meetings. Question: Where did these meetings take place if you recall? Answer: In Cleveland, Ohio. Question: Is that where the convention met? Answer: Yes. Question: Now, can you separate any of those meetings and tell us who was present at them and what took place? Answer: The first group of meetings we held, and they were held two or three in one day and a couple the next day, were held in the Hollenden Hotel in Cleveland, Ohio, with John Williamson present together with members of the Steering Committee and other people—Sanderson, Morris Wright, Irving Dichter, Herman Clott, these people among others who attended these meetings. Not all of them were present at every meeting. At the first meeting which was of a more formal nature, however, among the people present were those I just mentioned where the general approach to the convention was discussed, and Williamson stated that he thought it was imperative that we obtain a candidate for one of the top offices who had not been identified with the extreme left group heretofore."

Mr. Witt: And I won't read the rest of his answer, because it goes on to subjects which are irrelevant to this examination with Mr. Kelley's agreement.

Q. Now, Mr. Eckert, having heard that testimony you gave in answer to those questions in March of last year I

will ask you whether you recall naming those people you named who were present at at least one meeting with John Williamson.

A. I recall questions and answers in the general way as stated there.

[fol. 421] Mr. Witt: If the Court please, I think when we recessed there was still some confusion about the meeting I was asking him which took place in Chicago in 1947, and the confusion was between the meeting at the Communist Party Headquarters and the meeting at Henry Horowitz's, and I think for continuity, and I do not think it need take too much time, I had better start afresh on that subject so there will be no doubt in the mind of the witness or in the minds of the jurors.

The Court: All right, you can proceed.

Q. Mr. Eckert, I will ask you to listen to this testimony that you gave last week in this trial, page 154, about a meeting in Chicago. "Question: Now, I believe you stated that there were two meetings of the Steering Committee in Chicago prior to the 1947 convention in St. Paul. Do you recall when in reference to the time of the Horowitz meeting the other meeting occurred?"

Mr. Witt: May I stop here with the permission of the Court and Mr. Kelley to say this, to obviate the possible confusion again that we got into before the recess I think Mr. Kelley will agree that before this point to which I am directing the witness's attention he has already testified about the Horowitz meeting, and now he has gone back to this other meeting at Communist Party Headquarters which took place before the Horowitz meeting.

Q. Then, if you recall that question, Mr. Eckert, your answer was: "There has been another meeting prior to the meeting in the Horowitz house in the Communist Party office in Chicago where these matters had been discussed and decision made there to call what we called at this time an enlarged—" and then there is the objection by Mr. Deikman and sustained by the Court, and then the interrogation picks up again at the bottom of the page, 154: "Question: At this meeting in the Communist Party Headquarters will you state who was present there? Answer: Maurice Travis,

Gil Green, Fred Fine, Al Skinner, myself, Harold Sanderson. I don't recall whether the other member of the Steering Committee, Chase Powers, attended that meeting or not." Now, you remember that testimony of yours last week particularly that last answer I read you in which you gave the names of the people who attended that meeting at the Communist Party Headquarters?

[fol. 422] A. I recall that was the general answer to your question.

Q. Now, Mr. Eckert, I will direct your attention to the people you named as being present at that meeting in the Headquarters of the Communist Party in Chicago in 1947 before the Horowitz meeting, the people you named when you testified the first time against Travis, Volume II, December 1, page 245. To get some continuity, Mr. Eckert, I will read you several questions and answers: "Question: Now, I asked you if prior to this meeting at Horowitz's house whether or not there had been a Steering Committee meeting in which the program of policy or the course the discussion was to take at the Horowitz meeting was planned? Answer: Yes. Question: Who was present at that time? Answer: Gil Green, Fred Fine, Maurice Travis, myself, and Al Skinner. Question: Where was this meeting held, if you recall? Answer: In the Illinois Communist Party Headquarters in Chicago. Question: Was this immediately prior to the Horowitz meeting? Answer: Yes." You remember those answers you gave to those questions on the first trial and particularly the answer where you named the people present at that meeting at Communist Party Headquarters?

A. I believe that would be the answer that I gave.

Q. Mr. Eckert, you testified last week about a Steering Committee meeting in the hotel room in St. Paul during Mine-Mill convention in 1947 when you were on the stand last week, page 159. I ask you whether you recall giving the following answers to the following questions: "Now, this one meeting you referred to as a true, I would characterize your statement as being a true Steering Committee meeting, where was that held? Answer: In the hotel room in St. Paul. Question: And who was present at that time? Answer: Present were Maurice Travis, Chase Powers, Al

Skinner, myself, Harold Sanderson, and the National representatives of the Communist Party whose names I cannot recall." Do you recall those answers to those questions and particularly the last answer I read to you where you gave the names of those you recall were present?

A. Yes, I believe that is the answer that I gave.

Q. Now, Mr. Eckert, I will direct your attention to your testimony about a meeting in the hotel room in St. Paul during the convention in 1947, the testimony you gave on the first trial, and ask you to listen to the following answers which you gave to the following questions: "Question: Now, during the convention at St. Paul do you recall a hotel room meeting in which the subject of discussion was the support or nonsupport of a man by the name of Wilson for Eastern Vice President? Answer: Yes. Ques-[fol. 423] tion: And this was during the convention, was it? Answer: There were several meetings held before the convention and during the convention. Question: Do you recall any meeting at which a representative of the National Communist Party, that is, the Communist Party of the United States, National Representative was present? Answer: Yes. Question: And do you recall who that National Representative was at this time? Answer: I don't recall the name. Question: And who else was present at this hotel room meeting? Answer: Maurice Travis, Chase Powers, Al Skinner, and myself." And I will ask you whether you recall that testimony of yours on the first trial and particularly that last answer in the course of which you named those present at that session?

A. Yes, I believe that to be my testimony.

Q. Do you have any explanation for the ladies and gentlemen of this Jury in connection with several of these meetings I interrogated you about that you did not testify on the first trial that Harold Sanderson was present while in connection with this one you remember in 1958, you didn't remember in 1955 that Harold Sanderson was present?

Mr. Kelley: The Government objects to that as testimony by counsel. The record speaks for itself, and it is argumentative.

The Court: I sustained the objection two or three times, but I think I will let the witness answer.

Mr. Witt: Do you want the question read back?

The Witness: I would like to have it read back, please.

(The reporter read the last question.)

A. I don't recall, first of all, the answers to any question of having stated that I did not remember people being present there. The meetings referred to in the question I doubt very much whether the second meeting refers to the first one. My recollection of the events and the testimony I have given here and other places is that at St. Paul prior to and during the convention there were a series of meetings, sometimes several in one day, and the times that I have testified as to the people who were present at the meetings asked by Mr. Witt, I have testified as to the people I recall being present at the times that I could remember. As Mr. Witt calls for an explanation why, I am not a psychologist that I can explain why I can remember at one time more than I can remember at another time, but that is the work- [fol. 424] ings of my mind, and I don't know what the psychological reasons would be, but sometimes as a result of the question or preceding questions my memory is refreshed, and I can remember names of people at these meetings years ago at certain times that other times for one reason or another I may not recall at the precise moment.

Q. Mr. Eckert, if I caught the first part of that answer, were you saying that there is some question in your mind as to whether the meeting of the Steering Committee in the hotel room at St. Paul in 1947, which you testified about last week in this trial, was a different meeting than the meeting which took place in St. Paul in the hotel room in 1947 on the first trial?

A. There is considerable doubt on the basis of the question as you propounded to me whether you are referring to the same meeting or not.

Mr. Witt: If the Court please, if there is any question about that, the prosecution, of course, will handle that on redirect examination.

The Court: Well, I thought you had done that to the extent you were able to do it.

Mr. Witt: I have done it up to the point I am interested in, but, if the prosecution and the witness have doubt about

it, they can go into it on redirect. I have recross examination.

The Court: I think it is a question for the Jury and a matter of argument. You can tell the Jury why you think it was the same meeting, and, if there is any argument the other way, you can make it. I assume you have produced all your evidence.

Mr. Witt: Yes, for my purposes, but what I was referring to now was the normal right of the prosecution on redirect if they have any question about it.

Mr. Kelley: I think we understand our rights.

Mr. Witt: Yes. I am not trying to tell the prosecution, but in view of what the witness said I thought I ought to make that statement.

Q. Mr. Eckert, you gave testimony last week on direct examination about a meeting in St. Paul during the same [fol. 425] convention in 1947 I have been asking you about which you called a progressive caucus meeting, page 163. I will ask you to listen to the following answers which you gave to the following questions about that meeting of the so-called progressive caucus. "Question: You mentioned having attended a progressive caucus meeting, and I will ask you whether or not Mr. Travis attended that meeting. Answer: Yes, he did. Question: And who presided at that meeting if you recall? Answer: I don't recall who presided at the meeting. Question: And about how large a meeting was it? Answer: My recollection is that the meeting contained 50, 60 people more or less. That is about as close as I can recall. Question: And will you name those that you recall being present at that meeting? Answer: The people present were members of the Steering Committee, Maurice Travis, Chase Powers, Al Skinner, and I, Harold Sanderson, Morris Wright, Irving Dichter, Mr. Jencks, Pete Zvara, Ernest Love. These are some of the people I recall having been there. Homer Wilson also." Do you remember naming those people last week whose names I just read you as being present at that meeting of the so-called progressive caucus in St. Paul?

A. Yes.

Q. Mr. Eckert, I will now read your testimony about that meeting of the so-called progressive caucus which you gave

on the first trial against Mr. Travis: "Question: Now, at this progressive caucus that was held following the hotel room meeting was Maurice Travis present? Answer: Yes. Question: Do you recall who else was present, some of those who were present? Answer: Yes. All the members of the Steering Committee were present. The people who had attended the meeting in Henry Horowitz's house, other people who were non-Communists in addition to a considerable number of other Communists, Pete Zvara, Homer Wilson also attended." I will ask you whether you recall that testimony about that meeting in the first trial and particularly the last answer I read you as to what persons attended that meeting of the so-called progressive caucus.

A. No, I emphatically deny that I named Pete Zvara as a Communist at that meeting.

Mr. Witt: I think the witness misunderstood the testimony.

The Witness: That is what you said.

Q. I am sorry, Mr. Eckert. If I said that, I misspoke. You can look at this, and I think it is a question of punctuation. I don't interpret that, Mr. Eckert, and, if the Court [fol. 426] please, and Mr. Kelley, and, ladies and gentlemen of the Jury, as Mr. Eckert's having testified that Pete Zvara was a Communist. I think the punctuation could have been better in that transcript in that answer.

A. I think with the correction in the punctuation which changes the meaning of it that was my testimony.

Q. So, the only question in your mind was whether, the way I read it to you, it sounded as if you had testified that Pete Zvara was a Communist, is that right?

A. That's right.

Q. Now, I will ask you about that answer you gave on the first trial about the people who attended that progressive caucus. In that answer, Mr. Eckert, you said that all the members of the Steering Committee were present, that would be yourself, Travis, Powers, and Skinner, is that right?

Mr. Kelley: May it please the Court, I don't think there is any point in trying to go into the questions asked on the first trial. He has got the actual answer that was given,

and that is as far—we can't try collaterally the first trial over again.

The Court: Well, I don't know whether that is what he is trying to do or he is trying to ask him something he presently recalls.

Mr. Kelley: I don't either for sure.

Mr. Witt: Yes, sir, this is preliminary, your Honor. There is another matter of impeachment I want to get to in connection with his testimony in this trial.

Q. So, Mr. Eckert, you remember the question?

A. No, I don't think I do entirely.

Q. I will start again. I am referring to the answer you gave on the first trial as to the people who attended that so-called progressive caucus meeting in St. Paul. In your answer you began by saying all the members of the Steering Committee were present. Do you recall that?

A. Yes, that is my recollection.

Q. And then you said, and I quote from the same answer, the same sentence, Mr. Eckert, "The people who had attended the meeting in Henry Horowitz's house." Now, with respect to that part of the answer, the people who had attended the meeting in Henry Horowitz's house, you testi- [fol. 427] fied, do you recall, both on the first trial and last week here in this trial that Gil Green and Fred Fine, two Communist Party officials, attended the meeting in Henry Horowitz's house, do you remember that?

A. Yes.

Q. Do you want me—

A. If I want what?

Q. I will ask you then when you gave that answer on the first trial that the people who had attended the meeting in Henry Horowitz's house also attended the meeting of the progressive caucus in St. Paul you intended by that answer to testify that Gil Green and Fred Fine attended the meeting of the progressive caucus.

Mr. Kelley: May it please the Court, he is cross-examining him about his testimony on the first trial, as I understand.

The Court: I think that is highly argumentative.

Mr. Witt: May I be heard on it a moment, your Honor?

The Court: Yes.

Mr. Witt: In this trial he has now said that he testified about the Horowitz meeting, that these two Communist Party officials, Gil Green and Fred Fine, attended that. You recall that was the meeting immediately prior to the St. Paul convention. In this trial when he testified about the meeting of the so-called progressive caucus in St. Paul he did not use the same phraseology as he used on the first trial, he did not say the people who had attended the meeting in Henry Horowitz's house, and apart from not making that reference he did not say that Gil Green and Fred Fine attended the meeting of the progressive caucus in St. Paul, so, I am trying to impeach his testimony in this case by aspects of the testimony he gave on the first trial.

The Court: Well, I think the form of the question itself was argumentative. Will you read the question, Miss Marson?

Mr. Witt: Perhaps I should try to rephrase it.

The Court: If you wish to argue to the jury about who was there, all right. There is no use of arguing with the witness.

Mr. Witt: Maybe I can rephrase it in simple form. Per- [fol. 428] haps the question was badly put. I do not mean to argue with the witness.

Q. I will ask you now, Mr. Eckert, whether Gil Green and Fred Fine attended the meeting of the so-called progressive caucus at St. Paul.

A. No, they did not.

Q. Now, you testified, did you not, on direct examination here last week about the meeting at Henry Horowitz's that Graham Dolan attended that meeting?

A. Well, I don't recall the testimony.

The Court: I think the record will show what he testified, and you can argue it.

Mr. Witt: I wanted to save a little time.

Mr. Kelley: I think also he went into that previously.

The Court: I remember very distinctly.

Mr. Witt: No, sir. I went into it with respect to the Horowitz meeting. Now, I want to go into it with respect to the so-called progressive caucus meeting, your Honor.

The Court: You are attempting now to fix what is referred to in the answer as being at the Horowitz meeting, isn't that what you want to do?

Mr. Witt: That is preliminary to fixing who was at the meeting of the progressive caucus which is the main subject of my present line of interrogation, and I have to do it, because the way the witness answers by reference to the Horowitz meeting.

The Court: I still, if I understand what you are trying to do, I still think it gets into the argumentative stage, and I think it ought to be argued to the jury, because all the facts are in the record.

Mr. Witt: All right. I think I can simplify it by simply asking the witness this question, if I may, without I hope transgressing your Honor's ruling.

Q. Mr. Eckert, according to your present recollection did [fol. 429] Graham Dolan attend the meeting of the so-called progressive caucus in St. Paul?

A. According to my recollection he did.

Q. Mr. Eckert, I will direct your attention now to your testimony last week here on direct examination about the meeting which took place in New York early in 1948 attended by you, Travis, certain leaders of the Communist Party, and certain leaders of other trade unions, page 174, and I will read you your testimony last week in answer to the following questions: "Question: About when, if you can state, Mr. Eckert, did this meeting occur? Answer: Well, it occurred the early months of 1948, I believe February as near as I can recall. Question: Now, who was present at this meeting? Answer: Present in addition to Maurice Travis and myself were John Williamson, Eugene Dennis, William Z. Foster, Arnold Johnson, Al Lannon, Hugh Bryson, James Matles, Julius Emspak, a couple of people representing the Furniture Workers Union, I don't recall their name, another person representing the or a couple of people representing the Farm Equipment Union whose names I don't recall, a person representing the Furniture Workers Union, I don't recall his name, Ben Gold. These were some of the people I recall having attended that meeting. Question: Do you recall whether or not there was a representative of the National Maritime Union there? Answer:

I mentioned Al Lannon was there in that capacity. Gil Green was also there." Do you remember that testimony of yours last week and particularly do you remember naming those leaders of the Communist Party and those officials of trade unions including Travis?

A. Yes.

Q. Mr. Eckert, you testified about that meeting in New York early in 1948 when you testified against Ben Gold in Washington, D. C., didn't you?

A. Yes, I believe I did.

Mr. Witt: May we go off the record a moment?

(Discussion off the record.)

The Court: You can proceed, and, if Mr. Kelley thinks there should be objection, he will make the objection.

Mr. Witt: For your Honor's information particularly because I don't think this would concern the jury may I state for the record that what I have is not the typewritten transcript of testimony in that trial but the appendix to the appellant's brief which was used on appeal to the Court of Appeals in the District of Columbia. It has been used on other occasions without objection from [fol. 430] the Government.

Q. "Question—" This is by Mr. Lowther, Government Attorney on your direct examination in the Gold Case, Mr. Eckert. "Question: Subsequent to this meeting with Mr. Gold were there other meetings attended by you with Mr. Gold? Answer: I attended another meeting, at least one other meeting of top Communist officials in New York City where Mr. Gold was present." And then counsel for the defendant at the top of page 1428 asks that the time and place be fixed. Then, the next question on page 1428 by Mr. Lowther: "Question: Do you recall when and where it was, Mr. Eckert? Answer: We attended a meeting in New York City early in 1948 in a trade union center. I don't know what street it was on. We got in a taxicab and went down there. Question: Who went with you? Answer: Maurice Travis accompanied me. Question: Is this the same Maurice Travis that you have testified was the Mine-Mill—" And Mr. Lowther never finished that question. The witness answered, "Yes. Question: How

did you happen to go to the meeting? Answer: I was instructed by Maurice Travis to attend that meeting." And then I will skip the next question and answer, because it has to do with the time of day, and then I get to the question about who was present. "Question: Who to your recollection was present at that meeting? Answer: This was quite a large meeting. Present were officials of the Communist Party, John Williamson, Trade Union Secretary of the Communist Party of the United States, Eugene Dennis, the General Secretary of the Communist Party of the United States, William Z. Foster, National Chairman of the Communist Party of the United States, Arnold Johnson who was I believe at that time District Organizer of the Communist Party in Ohio, Gilbert Green, District Organizer of the Communist Party in Illinois, and there were other Communist Party officials, and a number of trade union officials from various unions, Maurice Travis and myself of the Mine, Mill and Smelter Workers, Benjamin Gold from the Fur Workers Union. There was Mr. Matles and Mr. Emspak from the United Electrical and Radio Machine Workers of America." Then I will skip the next question, because it is not relevant. Question on page 1429: "Other than Matles and Emspak from UE who were the other labor leaders who were Party leaders at that meeting? Answer: Mr. Perlo of the Furniture Workers Union, Mr. Brighton from one of the unions on the West Coast."

Mr. Witt: May I stop at this point, if the Court please and Mr. Kelley, to correct that typographical error? I [fol 431] don't think there is any question about it. The witness testified in this trial that a Mr. Bryson attended the meeting, and in this appendix in the Gold case it says Brighton. I think Mr. Kelley will agree and we can stipulate that that is a typographical error and the name is Bryson.

Mr. Kelley: We assume that is correct.

Mr. Witt: You can ask the witness, Mr. Kelley.

Mr. Kelley: Mr. Eckert, is the name "Brighton" in there a typographical error to the best of your knowledge?

The Witness: If I testified about a Brighton being there, I meant Bryson.

Mr. Witt: Then, in the ipulation accepted, your Honor, that that is Bryson in the Gold appendix?

The Court: All right.

Q. "Mr. Lannin from the National Maritime Union, Mr. Oakes, and two other officials of the Farm Equipment Workers Union of America. There were a number of other people whose names I don't recall, a few I didn't even know."

Mr. Witt: I just want to make sure, your Honor, it will take me a moment to make sure that the witness on the Gold case didn't later after further interrogation come back with some other names. No, I think that does it. Thank you.

Q. Now, Mr. Eckert, having heard that testimony of yours in the Gold case particularly those names you mentioned of the people present do you recall naming those people in the Gold case as having been present at that meeting?

A. I don't recall the testimony in the Gold case.

Q. Mr. Eckert, do you recall testifying about that meeting on the first trial against Travis?

A. Yes, I think I did.

Q. Do you recall whether you testified on that occasion that Bryson attended that meeting?

A. I don't recall whether I mentioned Bryson's name at that time or not.

Q. Mr. Eckert, I will ask you to listen to the following testimony you gave on the first trial against Travis as to who was present at that meeting in New York: "Ques-[fol. 432] tion: And with whom did you go to that meeting? Answer: With Maurice Travis.

Question: Now, were there any other representatives of the International Union of Mine, Mill and Smelter Workers at that meeting? Answer: No. Question: Now, will you tell us who else was present at this meeting, and when you do, if you would—it might save some time—if you would tell us who they were at the time. Answer: John Williamson, National Trade Union Secretary of the Communist Party; Eugene Dennis, General Secretary of the Commu-

nist Party of the United States; William Z. Foster, who had the title of Chairman of the National Communist Party, I believe his title was; Arnold Johnson who was the Ohio State Secretary of the Communist Party; Gil Green, the Illinois Secretary of the Communist Party; other Communist officials; and in addition to them a large number of trade union officials who were members of the Communist Party including Ben Gold who at that time was National President of the Fur and Leather Workers Union, Julius Emspak, and Matles, both officers of the United Electrical and Radio Machine Workers Union, Allanson from the National Maritime Union—" The transcript reads "Allanson from the Maritime Union". I am prepared to stipulate in reading the answer that that is a typographical error and the witness there was referring to Al Lannon.

Mr. Kelley: It is so stipulated.

Mr. Witt: Of the Maritime Union. It goes on.

Q. "Al Lannon from the National Maritime Union—I don't know if he had a title in that Union or not—several representatives of the Farm Equipment Workers Union whose title in that Union I don't know, a representative of the Furniture Workers Union whose name I do not recall, and a number of other trade union people who were Communists." And I think that is the end of your testimony, Mr. Eckert, on the first trial as to who was present at that meeting in New York in 1948, and I will ask you whether you remember naming those people as being present at that meeting. A. Yes, I think those are the people that I named.

Mr. Kelley: It is understood, Mr. Witt, that you are still referring to those named on direct testimony and not those that may have been named later on cross examination?

Mr. Witt: Yes, as far as I know there were no further names on cross examination, but, if I am wrong about that, [fol. 433] again, it is a matter for redirect.

Q. Mr. Eckert, I now will read you the testimony you gave about this meeting when you appeared before the SACB in Washington last year.

Mr. Witt: I think I can save a little time by skipping the preliminaries, if the Court please. I am sure Mr. Kelley will agree this is testimony about that same meeting. "Question: Can you tell us who was present at that meeting or as many as you can recall? Answer: Present were John Williamson, National Trade Union Secretary of the Communist Party of the United States; William Z. Foster, the National Chairman of the Communist Party of the United States; Eugene Dennis, who was General Secretary of the Communist Party of the United States; Arnold Johnson, Ohio State Secretary of the Communist Party; Gil Green, Illinois State Secretary of the Communist Party of the United States. These were the Communist Party officials that I can recall. The trade union officials who were members of the party present were Al Lannon an official of the National Maritime Union, official at that time, Julius Emspak, International Official of the United Electrical, Radio and Machine Workers; James Matles, International Organizational Director of the International Electrical, Radio and Machine Workers of America; Grant Oakes, President of the Farm Equipment Workers Union of America; Travis and myself, of course, Ben Gold, President of the International Fur Workers Local Union, and a member of the Central Committee of the Communist Party at that time. These were some of the people I recall attending the meeting." You remember that testimony in Washington last year before the SACB particularly testimony you gave about who was present at the meeting?

A. That appears to be the testimony I gave.

Mr. Witt: All right then, still referring to the witness's testimony in Washington last year before the SACB there came a time, if the Court please and Mr. Kelley and ladies and gentlemen of the Jury; when the witness came back to that subject, and this is the only other place in that testimony as far as we could find it.

Q. So, Mr. Eckert, I will ask you whether you recall your further testimony before the SACB in Washington last year, page 1091, when you were asked the following questions on direct examination about James Durkin. "Question: [fol. 434] Do you know James Durkin? Answer: Yes. Ques-

tion: Where did you meet James Durkin? Answer: I first met James Durkin in California in the early 40's. Question: And did you have occasion to meet him subsequently to that time? Answer: Yes. Question: Was he a member of the Communist Party? Answer: Yes. Question: Do you recall where you met him? Answer: Yes. Question: Where was that? Answer: At the meeting in New York City at the downtown trade union center."

The Court: What does this have to do with the case here on trial?

Mr. Witt: Well, your Honor—

Mr. Kelley: I haven't the slightest idea, your Honor.

Mr. Witt: Do you want me to answer that in front of the Jury? I will be happy to.

The Court: I think the jury will be instructed to disregard what you are reading. I can't understand what it has to do with this case on trial.

Mr. Witt: May I have the Court's permission to state our position as to what it has to do with the issues in this trial?

The Court: All right.

Mr. Witt: With respect to this particular piece of testimony about James Durkin I was coming to the last answer to that where he answers that James Durkin attended this meeting in New York in 1948, that being the first time, and this is argument to the jury, your Honor, I am sorry, but I have to answer your Honor's question, and this is the first time, this being in 1957 before the SACB that he ever mentioned the name of James Durkin as being—

The Court: Then ask that. You are reading a lot of preliminary matter. Ask him the question, and, if it is pertinent, we can rule on it. Ask him if he testified whenever you say the occasion was that this man was present. That is all there is to it. The rest of it is all a matter of argument.

[fol. 435] Mr. Witt: No, sir. I thought this was the procedure we agreed upon in Chambers.

The Court: If it is relevant.

Mr. Witt: I would just as soon make it short. But anyway, as I said, I was coming to the final answer.

The Court: What you read has no relevancy on the basis you are indicating. The jury will disregard that, and, if

you wish to interrogate about the presence of any person at this meeting, you may do that.

Mr. Witt: I am sorry. I just want to be fair to the witness. I will be glad to shorten it as you suggest with Mr. Kelley's agreement.

Q. Anyway, Mr. Eckert, do you recall that when you were asked where you met him after having met him in California you gave the following answer, and this is the point, your Honor, and your answer was as follows: "At the meeting in New York City at the downtown trade union center that I testified to where the subject of non-Communist affidavits was discussed." Do you remember giving that answer to Mr. Broome about Mr. Durkin's attendance at the meeting in New York?

The Court: I still don't see the relevance. What is the Government's objection?

Mr. Kelley: The Government—Mr. Witt is talking about being fair to the witness, I think, if he is going to talk about something that appears to be so disconnected from any of this other testimony, that the witness should have an opportunity to read enough of this transcript to find out if he is talking about the same thing.

Mr. Witt: I am trying to save time.

Mr. Kelley: I can see no relevancy.

The Court: The thing is so simple. If I understood Mr. Witt's purpose, as I understand, he is trying to show that at one of these hearings he omitted a certain name that he said was present in another hearing. It is just as simple to [fol. 436] ask him that. There is no use of going into all of this side matter about when he became acquainted with the witness and all that. Simply ask him if mentioned whatever this name is when he testified now or in this particular trial here. That is the question.

Mr. Witt: Perhaps it is my understanding, but I thought, we agreed in Chambers that with respect to this kind of examination that instead of examining the witness with general questions and preliminary questions in each case I would confront him with the transcript, number one, and, number two, I think in fairness to the witness I want to give him some continuity, but if your Honor and Mr. Kelley prefer, I will avoid the continuity and go to the question I am interested in.

The Court: It is very simple. Simply ask him the question that you claim is inconsistent or contradictory with testimony he gave in the trial and in other meetings, and this other matter of meeting him in California obviously has nothing to do with this trial.

Mr. Witt: Will your Honor bear with me a moment?

The Court: Yes.

Mr. Kelley: I think maybe, your Honor, I can clear this up.

Mr. Witt: I hope Mr. Kelley isn't going to make any statement in the presence of the witness that the witness should not hear.

The Court: I assume that he is not. What is it you have to say?

Mr. Kelley: I will pass it, and maybe Mr. Witt can straighten out his own problems.

The Court: If you have any question, Mr. Witt, that comes within the pattern you have been discussing that you and counsel discussed in Chambers, you can proceed. Ask him if he so testified at a certain trial.

Mr. Witt: That is my question.

[fol. 437] The Court: You have read a whole page of material.

Mr. Witt: All I can protest to your Honor is that I tried to give him the continuity. I think I understand your Honor now.

Q. Mr. Eckert, having looked at that do you recall giving that answer to the effect that James Durkin attended the meeting in New York City at the Downtown Trade Union Center where the subject of the Non-Communist affidavits was discussed?

Mr. Crandall: Your Honor, interjecting the name Durkin has no relevance to this case. It is beyond the scope of the examination. I think in each of these instances where he has mentioned the various testimony the record will reflect that he said there were more people than the ones he named. So, I do not see where Durkin would make any difference.

Mr. Witt: That is argument to the jury which I am prepared to answer now or later, your Honor.

The Court: I think that probably is in the argumenta-

tive state. The witness can answer that question. Are you sufficiently advised to answer the question?

The Witness: Yes.

The Court: All right, you may answer the question.

A. Yes.

Q. You gave that testimony?

A. Yes.

Q. And did Durkin attend that meeting at the Trade Union Center in 1948?

A. Yes.

Q. Then, Mr. Eckert, are you able to explain to the ladies and gentlemen on this jury and to the Court why it is—

Mr. Kelley: May it please the Court—

Mr. Witt: May I finish my question.

Mr. Kelley: I think the question is improper. It is the same type of question that the Court has ruled on before.

The Court: I let him answer it the last time. I think the [fol. 438] witness is entitled to explain if he wants to. I have been sustaining the objections right along, and I think technically they are good because the jury are the judges in the final analysis about the matter, but you would have a right to ask the witness on redirect examination if he wishes to explain or anything of that sort. I think I will sustain the objection notwithstanding the fact that I let him answer last time, but the Government can develop it on redirect examination.

Mr. Witt: Your Honor, I want to make my record on this. I didn't complete my question.

The Court: I think that's right, but I assume, and I will reserve my ruling until you have completed your question.

Mr. Witt: All right, sir. Can I have the question read?

(The reporter read the last question.)

Q. —why it is, Mr. Eckert, that when you testified in the Gold case in 1954 you did not mention the name James Durkin as being present at that meeting, why it is that when you testified the first time against Travis in this case in 1955 and you gave the names of people present at that meeting you did not mention the name of James Durkin, and why after mentioning the name of James Durkin before the SACB in 1957 when you testified about that

meeting you omitted the name of James Durkin when you testified about that meeting on direct examination last week?

A. Yes.

The Court: I think I will let him answer the question.

Mr. Kelley: It is all right with me, your Honor.

The Court: Since I have heard the form of the question, my statement sustaining the objection will be withdrawn.

A. Without being repetitious as to the reasons for not being able to recall all the names of people who attended meetings many years ago, names that I have recalled at the various times that I have testified, the names of the people that I was more closely associated with and with whom I knew best are the ones that usually would occur to me first. Some of those with whom I was only distantly acquainted were (sic) sometimes they didn't occur at all. Mr. Durkin [fol. 439] happened to come in that category that I knew not very well at all, and in so far as I am able to analyze that appears to me to be the reason why in some of those other cases the names of Mr. Durkin and others whom I have never been able to recall were not mentioned as having been at this meeting in New York City.

Q. All right, Mr. Eckert, in view of that answer I will ask you why it is that when you testified against Gold in 1954 you mentioned the name of Hugh Bryson, that when you testified against Travis the first time in 1955 you did not mention the name of Hugh Bryson, and why it is that when you testified about this meeting and who was present before the SACB in 1957 you did not mention the name of Hugh Bryson, and then when you testified about that meeting on direct examination last week here in connection with that meeting you said that Bryson was one of those present, will you explain why in view of your psychological explanation as to whom you know well and as to whom you don't know well why you mentioned Bryson the first time in all of this testimony in the Gold case and then did not name him on the two subsequent occasions in the first Travis trial and before the SACB and then named him again on the second trial of Travis?

A. Yes, sir.

Q. All right.

A. I think that the only thing I could add again is that for the reasons already stated at the particular time these questions are asked me my recollection is seldom—I am seldom asked to name all of them, but I name those that I can recall at the time. The name of Mr. Bryson which has been mentioned here in this last question, he falls in that category. I mentioned his name when that name occurred to me in the difficulty, great difficulty of recalling these events that occurred so many years ago.

Q. Mr. Eckert, do you recall ever giving a statement to the FBI about this meeting in New York in early 1948?

A. Well, I recall giving the FBI the report of the CIO on the trial of Mine-Mill wherein to the best of my recollection that meeting was testified to by myself.

Q. Aside from giving the FBI a copy of your statement before the CIO did you at any time make a statement to the FBI orally or in writing about this meeting in 1948?

A. Never in writing. I don't recall whether I gave any orally or not.

Q. All right, Mr. Eckert, in view of your testimony that you gave the FBI a copy of the statement about this matter that you made before the CIO I will direct your attention to this typewritten copy of your statement before the CIO.

[fol. 440] Mr. Witt: This wasn't question and answer, if the Court please and ladies and gentlemen of the jury. This was a statement by Mr. Eckert without interrogation by counsel. "Mr. Eckert, I attended a meeting of a Communist meeting in New York City. Maurice Travis called me long distance one day and asked me if I could go to the hall."

The Court: What are we doing, laying a foundation? Ask him the specific question.

Mr. Witt: That is it. That is all one answer.

The Court: You can ask him what part allegedly is contradictory, inconsistent surely.

Mr. Witt: I will skip that paragraph, your Honor. I am so used to getting continuity, but I will skip it. I will go to the next paragraph that is preliminary to what I want to ask the witness.

Q. "Present at the meeting were William Z. Foster, the Communist Party National Chairman, Eugene Dennis, National Secretary, John Williamson, Organizational Secretary, I believe, Maurice Travis, myself, and quite a large number of representatives, leaders of other unions such as UE, Farm Equipment Workers, and others." Then there were questions about that meeting, and at page 263, if the Court please and Mr. Kelley, the witness does name Matles and Emspak of UE whom he didn't name at page 261, and then at page 264 he mentions Ben Gold whom he didn't mention at page 261. Now, having heard those names that you gave as having attended that meeting when you gave the statement before the CIO, Mr. Eckert, I will ask you whether you recall those are the names that you gave on that occasion.

A. Well, I don't recall the testimony I gave in 1950, but, if the transcript appears to say that, and I have no reason to doubt that is the testimony I gave.

Q. Well, Mr. Eckert, in discussion in Chambers on another matter, a matter that was within the province of the Court and not within the province of the jury, that took place in Chambers, didn't you have occasion to say in answer to a series of questions I asked you about your relations with Government agents and Government attorneys that time after time you gave Government agents and Government attorneys copies of your CIO statement?

[fol. 441] Mr. Kelley: That is immaterial.

The Court: I don't know the purpose of that, and I think the jury will be instructed to disregard it in its entirety.

Mr. Witt: I will withdraw it. I am sorry if your Honor thinks it is improper.

The Court: In answer to your question in the transcript he gave the testimony. There is no use for comments on the matter at this time.

Q. In your statement before the CIO you mentioned Foster, Dennis, and Williamson as Communist Party officials aside from trade union people including yourself who were there. Now, I will ask you this question, Mr. Eckert: When you testified in the Gold case, I read you that testimony a little while ago, in addition to testifying

that Williamson, Foster, and Dennis were at that meeting you testified that Arnold Johnson and Gil Green, two other officials of the Communist Party, were also present.

The Court: What we have in question, Mr. Witt, is the testimony in this trial here, not the Gold case.

Mr. Witt: I am coming to that, but I want to make my record, your Honor.

The Court: All right, let's proceed.

Mr. Witt: All right, I will ask him about this case. I will skip it.

Q. Mr. Eckert, in your testimony here last week on direct you testified that in addition to William Foster and Dennis, Arnold Johnson and Gil Green also attended that meeting in New York in 1948. Do you remember that testimony here last week which I read you a little while ago?

A. Yes.

Q. Do you have any explanation as to why it is that when you made a statement in 1950 about that meeting before the CIO you did not mention that Arnold Johnson and Gil Green were present while in 1958 you do mention that those two people were present?

[fol. 442] Mr. Vincent: If your Honor please, I think this has been gone into far enough. The witness has answered.

The Court: I think since we have started that we will let the witness answer again. You can answer the question.

A. As I understand the question, it is in regard to testimony last week and why I did not mention it in the CIO trial, is that the question?

Q. The question is why it is that when you made your statement before the CIO the only Communist Party officials you mentioned as being—

The Court: He has stated the question correctly. He knows the question.

Mr. Witt: I misunderstood him then.

A. I think the reasons that I have stated before apply here also, that Mr. Johnson and Mr. Green were officials of the Communist Party who attended the meeting, their

names did not occur to me at the times that I was asked as to who attended the meeting. The one hearing referred to which Mr. Witt referred to was not a trial in the sense that this is a trial, it was not a Government agency. It was a committee appointed by the CIO to try the Mine, Mill and Smelter Workers on the charge of having—

Mr. Witt: I object to this now. The witness is deliberately attempting to inject prejudice into this case, and I ask that he be directed to cease and desist and answer my question. The fact that this was a trial against the Mine-Mill isn't an answer to the question.

The Court: You asked the question, and the witness is going to be permitted to answer, and you may continue.

Mr. Witt: I do not think he should be permitted to make an inflammatory and improper speech.

The Court: You can read his last few words.

(The reporter read the last answer.)

[fol. 443] The Court: You may continue.

A. —of having been dominated by the Communist Party of the United States and having slavishly followed every twist and turn of the Communist Party policies. The procedure used in the hearing was quite different from the procedure used in a trial such as this. I was asked to recount to the best of my ability in narrative style in the method of just stating a whole series of things that I could remember without having specific questions directed to any given meeting or event other than occasional interjections of questions by some of the committee. For that reason on that occasion without having my attention directed to specific meetings it was much more difficult to remember all the people attending. In addition to the fact that this trial committee did not want to spend months hearing testimony, they wanted to get to the basic facts, I was under pressure to hurry.

In the second instance in the Gold trial, again, it is a question where at the particular time the question was asked me I named the people that I could remember that time, stated others I did not remember other times. Subsequent occasions Mr. Witt has inquired about here it just

so happens that I remembered their names, and so told the Court.

MOTION FOR MISTRIAL AND DENIAL THEREOF

Mr. Witt: If the Court please, I now move for a mistrial on the ground that this man has been permitted to make a highly prejudicial and inflammatory statement against Mine-Mill in the purpose of the proceedings before the CIO in the same way he has with respect to several other answers he has given on cross examination, and he has done that deliberately in order not only to confuse the issues before the jury, inject inflammatory testimony into this case but also to interfere with my right of cross examination as attorney for Mr. Travis in this case.

The Court: Your motion for mistrial will be denied. The answer was responsive to the question, and the question was propounded by you. You may proceed.

Q. Now, Mr. Eckert,—withdraw that.

Mr. Witt: If the Court please, I ask that at this point [fol. 444] your Honor give the jury a cautionary instruction to the effect that this man's statement about the purpose of the procedures before the CIO is not evidence against the defendant on trial in this proceeding.

The Court: Well, the Court will give consideration to that instruction and listen to any argument on it in Chambers. At the moment it will not be given, but the Court will reserve judgment on that, and, if it is proper, it may be included later. At the moment I see no basis for it. But I am not going to preclude your advising the Court as to why you think it should be given.

Mr. Witt: All right, thank you, your Honor.

Q. Now, Mr. Eckert, in view of your answer I direct your attention again to the question asked you by Mr. Lowther in the Gold case in answer to which you told them who was present at this meeting. "Question: Who to your recollection was present at that meeting?"

The Court: Didn't you already read this?

Mr. Witt: Now, I am coming back to it from another point of view in view of the answer he has just given, your Honor.

The Court: I don't see what basis there is for asking the question twice.

Mr. Witt: Well, I will argue that at the bench if you want to and point out what I have in mind. I can state it in open court if Mr. Kelley has no objection.

Mr. Kelley: I have no objection to his statement categorizing.

The Court: On the basis for interrogating the witness by asking this same question.

Mr. Kelley: I think this has been asked and answered two or three different ways. It seems to me once over would be adequate.

Mr. Witt: In view of the witness's answer the witness has opened up—

[fol. 445] The Court: Complete your question.

Mr. Witt: Can I have the reporter read back the question?

(The reporter read the last question.)

Mr. Witt: "Answer: This was quite a large meeting. Present were officials of the Communist Party." I am done, your Honor. Let me finish the answer, and then your Honor can sustain the objection. Then in answer to that the witness said, "Present were officials of the Communist Party," and named all five of them—Williamson, Dennis, Foster, Johnson, and Green. And what I am seeking to do is to show that that question by Mr. Lowther was no different than the situation that this man had before the CIO.

The Court: That is purely argumentative. You have read it, and it is in the record, and you can argue that to the jury.

Mr. Witt: All right, sir.

Q. Now, Mr. Eckert, I started to ask you before about the occasion you recalled on which you made a statement to the FBI about this meeting in New York, and you said that, if I recollect properly, that you recall giving the

FBI a copy of the statement you made before the CIO, is that right?

A. That is my recollection, yes.

Q. And I think you also said you don't recollect any other statement, oral or written, that you gave the FBI about this meeting.

A. I don't recollect any other, whether I gave other statements or not to the FBI pertaining to that particular meeting.

Mr. Witt: Is it all right if I don't mark this?

The Court: If there is any reference to it in the record, you had better have it marked.

(Document marked Defendant's Exhibit E for identification.)

Q. Mr. Eckert, I direct your attention to Defendant's Exhibit E for identification which is a photostatic copy of what appears to be a letterhead of the Federal Bureau of [fol. 446] Investigation, the office in Cleveland, and which consists of seven pages and direct your attention to page 6, the paragraph I am pointing to, just that one, and the following two short paragraphs, and ask you to read that to yourself and ask you whether it doesn't refresh your recollection that on or about the date on that document you made that statement to the FBI about that meeting in New York City in 1948.

A. I have read it. What is the question?

Q. The question is whether you now recall having looked at that that at that time you made the statement to the FBI about that meeting contained in that document.

A. I don't recall whether I gave the information, but it seems quite accurate, so, I probably did.

OFFER IN EVIDENCE

Mr. Witt: Instead of offering the whole thing in evidence these are three short paragraphs and may I read it into the record?

The Court: Is there any objection?

Mr. Witt: The same as we have been handling testimony?

Mr. Kelley: Well, the only objection, your Honor, is that this doesn't purport to be a verbatim or contemporaneously made statement.

The Court: Well, the witness said it was quite accurate.

Mr. Kelley: As to the content, yes.

The Court: If he can show you what it is he proposes to read.

Mr. Kelley: I know what he wants to read.

The Court: Any objection?

Mr. Kelley: Nothing particularly except it encumbers the record.

The Court: If you have no specific objection, he may read it.

Mr. Vincent: Shouldn't it be received in evidence first, [fol. 447] your Honor? It has only been marked for identification.

The Court: That is what he is doing, is reading it in evidence.

Mr. Witt: Just the three paragraphs in this document which are relevant.

The Court: All right, you may read it, and the record may show that he is reading from what has been marked as Exhibit E.

Mr. Witt: "In March, 1948, N. E. Travis of the MMSW-CIO instructed Eckert to accompany him to New York to attend the Communist Party Trade Union meeting. In attendance at this meeting in addition to Travis and Eckert were Ben Gold, Julius Emspak, James Matles, and other Communist Union officials representing the CP-USA; at this meeting were John Williamson, Eugene Dennis, and W. Z. Foster." That is the only paragraph that is really relevant to my cross examination, your Honor.

Q. So, now having read into the record those paragraphs I would like to ask the witness if he can explain why it is when he made this statement to the FBI in November, 1949, about a meeting which took place in 1948 he stated that the Communist Party officials or the people, I want to be absolutely accurate, quoting from this paragraph, "The people representing the CP-USA at this meeting were John Williamson, Eugene Dennis, W. Z. Foster," and

why he did not mention Arnold Johnson and Gil Green whom he named in the trial five years later.

Mr. Vincent: I think counsel is assuming a fact not in evidence. This witness has testified that he did not recall giving this information to the Bureau is my recollection of the testimony.

The Court: That I think is correct. He simply said that it sounded accurate or something to that effect. He could not recall the specific matter that he gave, whoever wrote up that report, and this is not, this is not a report made by the witness or it is not his testimony.

Mr. Witt: It is a statement as defined in Section 3500. Otherwise, we would not have it in our possession, your [fol. 448] Honor. So, this is as much this man's statement as his testimony on this witness stand.

The Court: I think I will let the witness answer the question. If you have anything to add—

A. The matter referred to in the report to the FBI, I don't recall having given it to them, but the information seemed to me to be accurate as far as it goes. The nature of the questions propounded to me by the FBI in so far as I can recall always dealt with a specific matter.

The Court: If he doesn't recall the specific situation with respect to it, I think an explanation is forthcoming, and he says he doesn't recall specifically what was said about it. So, the objection will be sustained.

Mr. Kelley: Well, your Honor, in view of the fact that the defense has asked for the explanation and he has given part of it I think in fairness to the witness we should let him complete his answer. The Government withdraws its objection.

The Court: The reason the Court is sustaining the objection, it is obvious that the witness is just basing it not on his memory of what happened but upon some kind of an assumption about what might have been the situation.

Mr. Kelley: Well, I quite agree with you, and we have to go on the assumption in the first place that everything he said was recorded and then he is stating how the interviews were conducted, the particular questions were addressed to him and he gave answers to particular subject matters or persons.

The Court: I say he has answered on the basis of general experience. On these other questions we had a specific matter, we had something that was in formal testimony given by him for which he could explain the reasons, but this not even being transcribed by him or even the circumstances such as not to be recalled by the witness I think it would be pure conjecture for the witness to attempt to say why these other names were not included in this report. So, I think the objection will be sustained.

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[fol. 449] COLLOQUY BETWEEN COURT AND COUNSEL

In Chambers

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Mr. Witt: Again, before we get to the witness we have two matters pending before your Honor. We do not press them for rulings now, but we are just referring to them to remind the Court and the prosecution. One is the matter of a motion to strike that piece of testimony of the witness in connection with the CIO proceedings and the cautionary instruction to the Jury. The other has to do with the name of the Agent or names of the Agents in Detroit who talked to this man, Eckert, in April, 1953, about Jencks.

The Court: Well, I will tell you, I haven't had time to look at the transcript this morning. I started to do that; and I had a press of other matters around here, signing some orders and so forth, so, I haven't had an opportunity to look at the record at all. Let's pass up the first matter until I have had a chance to look at the record. I do not know about the other, I do not know exactly what the status of it was. I know the request was made, but I didn't know whether the Government—

Mr. Kelley: I can speak on that, your Honor. The Government is perfectly willing to give them the name of the Agent who sent the telegram. It was Thomas Beckwith, as I recall the name. If Mr. Witt wants to get out a subpoena, I will verify it or I can verify it anyway, but that is both Mr. Vincent's recollection as to what we were told, and it is mine. I had failed to make a note of it at the time.

The Court: All right, you can find the correct name and advise him what it is.

Mr. Witt: Can we do it this way, since we know what the problem is, perhaps the subpoena can be issued in blank if Mr. Kelley isn't sure of the name and we can arrange for service?

The Court: I think the best thing is that you just give him the name.

Mr. Kelley: I am quite sure it is right, and, if we find out it is not, we will so advise you.

[fol. 450] Mr. Witt: We will discuss that further off the record with Mr. Kelley. One other point in connection with the same problem that we should be clear on the record, I am not sure it is, perhaps my memory isn't holding up on it, I think we are entitled to a statement from the prosecution and perhaps from the Court, I am not sure, your Honor, as to whether there are any documents whether they could be called statements within the meaning of Section 3500 or not, any documents in the files of the FBI in Detroit or Washington or anywhenes else which pertains to this interview, whatever you want to call it which the FBI in Detroit had with Eckert about Jencks in April, 1953, aside from this telegram, of course, which we already have.

The Court: You gentlemen can check on that.

Mr. Kelley: We checked on that, and we have made the statement for the record as to the situation as to FBI reports.

Mr. Witt: Yes. I am sorry, I don't recall it.

Mr. Kelley: We have stated that we furnished all reports that can be found in connection with the testimony of the witness on direct examination.

Mr. Witt: Your Honor, I think we are entitled to a more precise statement than that from the prosecution on this issue. I think we are entitled to a statement from the prosecution on this issue specifically, that is, as to whether or not there is anything in the possession of the FBI or the Government anywheres, any kind of a document whether it is a statement as defined in Section 3500 or not in the opinion of the prosecution which deals with the interview which the FBI had with Eckert about Jencks in Michigan in April, 1953.

Mr. Kelley: Well, I do not understand. I have tried to tell counsel that we do not have any more.

The Court: I think the record will have to stand on that basis.

Mr. Kelley: In regard to that telegram or anything else. [fol. 451] The Court: I think we will let it stand on that basis. Is there anything else before you start with Mr. Eckert?

Mr. Witt: I do not think so.

The Court: All right, you can resume your interrogation then of Mr. Eckert.

Mr. Deikman: If it is permissible with the Court, I will continue the examination.

Mr. Kelley: Your Honor, the Government would object to that. It has never been the practice in this Court to permit counsel to switch on cross examination of a witness. I think it is highly improper, and it is contrary to all the practice in this court and as far as I know every other court in the country.

The Court: I think that is true, and in this court generally that is the practice. We do not switch attorneys in the middle of examination of a witness, but, since this is in Chambers, I think I will let Mr. Deikman proceed. But in the Courtroom, of course, I would not consider that. But I think in here we will let you go ahead.

Mr. Kelley: The reason they give, your Honor, is that it is not fair to the witness to subject him to two different types of cross-examiners.

The Court: I think we can proceed. I assume they will follow the same line they did. It is just a matter of continuing on with some other episodes I gather. You can proceed, Mr. Deikman.

Mr. Witt: This further word of explanation which I think the Court and counsel is entitled to: Mr. Kelley states the general principle correctly, but, as your Honor points out, this is not normal cross examination, the kind that takes place before the Jury. Aside from the point, the only point in this switch is that Mr. Deikman acknowledges that I have been working harder than he has, and this is an effort to have him share a little bit of the burden, that is all.

[fol. 452] The Court: Of course, Mr. Deikman will not go back over any of the matters that have already been discussed. It will be purely prospective. You may proceed, Mr. Deikman.

Mr. Deikman: Thank you.

The Court: I don't know where we left off yesterday. Somebody probably has the transcript.

Mr. Deikman: The transcript at page 659 indicates where we left off yesterday. I believe that the questions were in regard to the first appearance by the witness before the Grand Jury in connection with the Travis case in this court. I believe that the witness has stated that he did appear before that Grand Jury and that he talked to attorneys previous to his testimony before the Grand Jury.

Mr. Witt: Your Honor, in this connection we have been intending to get this clear: You will recall that the witness has testified that he did appear before that Grand Jury.

The Court: He testified to that in open court after we went back in there. What I am interested in is not going back over any of this.

Mr. Witt: No. I was about to say in open court the witness testified that his best recollection is that he testified against Travis in 1954 and 1955. So that the record will be clear on this point to be sure there is no dispute about it the record in this case shows that Travis was indicted on October 28, 1954. May it be stipulated that the witness appeared before the Grand Jury in connection with Travis in 1954 before October 28?

Mr. Kelley: If that is the date. I don't even remember.

Mr. Witt: That is the date of the indictment. It was the Thursday before election, you remember, Mr. Kelley. That is why I remember it so well.

Mr. Kelley: I do remember. We will stipulate to that.

The Court: I have found the place in the transcript.

[fol. 453] KENNETH ECKERT, testified as follows:

Examination.

By Mr. Deikman:

Q. Mr. Eckert, previous to your testimony before the Grand Jury in the year 1954 in this District I believe you stated that you had talked to attorneys for the Government.

The Court: That is all in here. Let's do not go back over that. That is in here at page 558.

Q. Do you recall what attorneys those were?

The Court: He said, he has answered that question, "I don't recall which attorneys handled the Grand Jury case on Travis." Let's go on with something new.

Mr. Deikman: All right, your Honor. Would it be all right to refresh his recollection on this?

The Court: No, it is in the record. There is no use of having him report what is in the record.

Q. All right, to go on with this, Mr. Eckert, do you recall whether you talked about Travis or Mine-Mill with those attorneys?

A. Well, my recollection is that there was a discussion pertaining to Travis. I don't recall whether it was Mine-Mill or not.

Q. Did you relate to such attorneys any matters on which you testified on direct on this trial?

Mr. Kelley: The Government objects to that. It is immaterial.

The Court: I will sustain the objection. You can ask him if he talked about the subject of the testimony he gave in the Grand Jury or something like that. I assume he did. I am assuming he did. I am assuming that before he appeared that he naturally talked with some attorney about the thing, but I don't think, as I indicated yesterday, the details of the conversation are pertinent. The question we are interested in here now is whether anything at that time was given in the nature of a statement that would come

within the definition of a statement within 3500, is what I understand the purpose of this thing is.

[fol. 454] Mr. Deikman: All right, your Honor.

Q. At the time that you talked to the attorneys before your appearance before the Grand Jury the first time did you give those attorneys any written statement made by yourself?

Mr. Vincent: We object to it, any written statement, your Honor.

The Court: He can answer if he can, if he recalls. You can answer, Mr. Eckert.

A. I don't recall whether I did or not.

Q. Is it possible that you did give them a written statement?

Mr. Crandall: I object.

The Court: I will sustain the objection. If there is an objection, I will sustain the objection to that.

Q. Did you give the attorneys anything in writing other than in your own handwriting in the nature of written material?

The Court: Well, I do not think you need to answer that question, because it is based on the assumption he gave them something in his own handwriting. He says he doesn't recall that he did.

Mr. Deikman: Well, your Honor, I covered the subject about his own handwriting, and now I am covering the subject of material, written material, other than in his own handwriting.

The Court: But your question, if the reporter will read it back, was on the assumption that he gave them that, and you are asking if he gave them something besides that.

Mr. Deikman: I will rephrase the question.

Q. Mr. Eckert, did you give the attorneys to whom you talked at that time any written material?

A. I don't recall whether I did or not.

Q. Did the attorneys to whom you talked to the best of your recollection take notes on the subject of your conversation with them?

A. I don't remember the discussions with the attorneys [fol. 455] prior to that Grand Jury investigation, and I don't remember whether they took notes of the conversation.

The Court: I am going to interrupt at this point. I want to talk about this juror business.

* * * * * * *

[fol. 456] Examination.

By Mr. Deikman (Continued):

Q. Mr. Eckert, after your conversations with these attorneys about whom we have just been speaking did they show you anything in writing they either individually or collectively, which they had prepared either individually or collectively at that time before you went in to the Grand Jury?

Mr. Crandall: I object, merely to show him anything in writing.

The Court: I do not see where that would come in the category. You might explain, Mr. Deikman, what you have in mind.

Mr. Deikman: Well, your Honor, we have asked a similar question before which the Court permitted, which, of course, relates to preparing on the basis of their interview with them a statement which they then prepare in their office and return to them for approval.

The Court: I didn't understand your question meant that. I may have misunderstood the question. What you are asking, after they talked to him they returned and submitted any statement to him, is that what you are asking him?

[fol. 457] Mr. Deikman: Yes. I would like to avoid the word "statement" because that calls for a legal conclusion on the part of the witness as to what a statement is.

The Court: I didn't understand your question. You might reframe it to cover that.

Mr. Deikman: All right.

Q. After your conversations with the attorneys for the Government did they prepare anything in writing related

to the subject which you had covered in your conversations and show that to you?

A. No, they did not.

Q. Mr. Eckert, do you recall testifying in the first trial of this case?

A. Yes.

Q. How soon before you came out to testify in this case in the first trial did you come into Denver?

Mr. Vincent: We object to that question, your Honor.

Mr. Deikman: I am trying to place the time in which such a statement may have been given, your Honor.

The Court: Well—

Mr. Kelley: It assumes there was one given.

Mr. Deikman: If there was one given, I would like to have the time.

The Court: Why don't you ask when he came to Denver, how far ahead of the trial did he come to Denver on the occasion he first testified?

Q. Will you answer that question?

A. I don't recall how soon I went on the stand after arriving in Denver.

Q. Did you come to Denver several days before the trial in order to prepare your testimony?

A. My recollection is I was here in advance of the opening of the trial all right. Whether it was several days or four or five I just don't recall.

Q. But it was not less than four or five days?

[fol. 458] Mr. Vincent: The Government fails to see the relevancy of this.

The Court: I think I will sustain the objection to it then.

Mr. Deikman: I think a reasonable inference may be made, your Honor—

The Court: You can argue any inferences?

Mr. Deikman: I mean a legal inference, not a factual inference, that a man who appears several days before the trial is bound to have made statements which were—

The Court: I do not think there is anything that would be inferred by that. Ask him what the fact is, about whether it was one day or two days or three days, whom he talked to and what happened.

Mr. Deikman: All right. I thought I was doing that, your Honor.

Q. You say it was about four or five days?

The Court: He didn't say anything of the kind. You are putting into your questions words that aren't in the testimony at all.

Mr. Deikman: May I ask him how soon before the trial and to the best of his recollection would he estimate the number of days before the trial that he was present?

The Court: I do not think he testified that way, but proceed. Ask him if it was a week or two weeks or three weeks, what happened is what I am interested in.

Q. All right, would you answer that question?

A. To the best of my recollection it was less than a week.

Q. Was it more than four days?

Mr. Kelley: May it please the Court, this is immaterial.

The Court: We are not going into all of these details. [fol. 459] Ask him whom he talked to prior to his testifying and what happened.

Q. Mr. Eckert, do you recall whether you were the first or the second witness in that trial?

Mr. Vincent: If your Honor please, that has no relevancy or materiality in this proceeding.

The Court: I do not think you need to answer that question.

Q. Did you talk to any attorneys previous to your appearance as a witness in that trial?

A. Yes.

Q. Do you recall who those attorneys were?

A. Some of them, yes.

Q. Could you give us their names?

A. Well, I talked to Mr. Kelley, to Mr. Mitchell. I think I talked to Mr. Swanson at that time. I am not sure.

Q. Which of those attorneys spent the most time with you?

A. Well, I didn't keep any record of that. I don't know.

Q. All right, let's talk about Mr. Mitchell. Did you talk

to Mr. Mitchell about your testimony in the first Travis trial?

A. Yes, my recollection is that I did.

Q. Did Mr. Mitchell make any notes as to the subject which he was covering with you at that time?

Mr. Kelley: The Government objects to that as wholly irrelevant and immaterial.

The Court: He can answer the question.

A. Well, I don't recall which attorney was making notes at that time.

Q. Was any attorney making notes?

A. My recollection is that some attorney did make notes.

Q. Is it your testimony that Mr. Kelley made notes?

A. I don't recall which attorney made notes.

Q. Did you submit anything in writing to those attorneys?

A. My writing you mean?

Q. Any kind of writing.

Mr. Kelley: That is irrelevant whether he submitted anything in writing unless it was adopted by him.

[fol. 460] Mr. Deikman: The Court won't let me talk about subject matter.

The Court: Let him answer the question, and then, if it can be developed what he furnished them, if he furnished them anything, it can be developed what it was. If he didn't furnish them anything, that is the end of it. You can answer.

A. Your Honor, I don't think I can answer the question yes or no. I think I could explain the situation.

The Court: Go ahead and do that.

A. Prior to this trial and a number of trials I provided the Government attorneys with certain documents which I referred to yesterday such as minutes of the International Executive Board of the Mine, Mill & Smelter Workers, the minutes of the Die Casting Division of the Mine, Mill & Smelter Workers, certain Marxian literature, material of that nature. I don't recall which cases I may have submitted that stuff to the Government or which cases they may have used any part of it.

Q. Mr. Eckert, I believe you testified previously in this trial that you also provided the Government with transcripts of the Mine-Mill convention proceedings and the CIO hearings.

A. Yes, I believe that's right, and certain correspondence which I omitted to mention in the previous answer.

Q. Relating to this correspondence do you recall whether you, what kind of correspondence it was, correspondence by you or what was it?

A. Some of it was correspondence by me, some of it was correspondence by Mine-Mill people to me.

Q. All right, Mr. Eckert, was any of this correspondence from you to Travis?

Mr. Kelley: The Government objects to that as being immaterial. If it was either to or from Travis, he would have copies of it, an original or a copy.

The Court: I think I will let him answer the question.

A. I don't recall whether it was or not.

Q. Was any of the correspondence from Travis to you?

A. I don't recall that either.

Q. Did you provide this correspondence?

[fol. 461] The Court: Let's get into something else. Go ahead and ask the question. As I understand, he hasn't even said that he gave that to the counsel in this particular transaction. He has testified that during the course of these various trials that on some occasions he had given this material to someone, and he doesn't recall definitely which trial this was provided. So, you can go ahead and ask the question, but I don't see how it brings anything in the category we are talking about at all. But proceed.

Q. Did you provide any of this correspondence to the attorneys at the time that I have mentioned?

A. I don't recall whether I did.

. . . . . .

[fol. 469] Q. Now, previous to your testimony in the first Travis trial did any of the attorneys or anyone employed by the attorneys or connected with the attorneys make any mechanical transcription of anything you said?

A. Not to my knowledge.

Q. After your conversations with the attorneys was anything prepared in writing which was returned for your inspection?

A. No.

Q. Now, Mr. Eckert, I believe you testified that you testified before the Grand Jury on the second time in Denver?

A. Yes.

Q. Now, do you recall when that was?

The Court: I think he fixed the time yesterday, didn't he?

Mr. Witt: Yes.

Mr. Deikman: That was in 1956. Can we stipulate to that, Mr. Kelley?

Mr. Kelley: Whatever the date is.

The Court: That was testified in open court. Mr. Witt asked him before the Jury, and he testified, if my memory is good, didn't you?

Mr. Witt: Yes, I think he said '56.

Q. Mr. Eckert, previous to your testimony before the Grand Jury in 1956 did you have any conversation with any attorneys for the Government?

A. Yes.

Mr. Kelley: That is a little general, I think.

The Court: Let him answer it. He has answered the question.

Q. Do you recall who those attorneys were?

A. I don't recall which attorneys I talked to. If my [fol. 470] recollection is right, I talked to Mr. Kelley.

Q. Mr. Broome?

A. Well, I don't recall Mr. Broome being involved in the trial proper. It is my recollection that he was here on an SACB matter.

Mr. Kelley: He is asking about before you testified before the Grand Jury this second time.

A. Oh! I thought you referred to the trial. I don't recall whether—it was not Mr. Kelley that I talked to before the Grand Jury, as a matter of fact.

Q. Was Mr. Kelley the only one?

A. I don't recall whether it was Mr. Kelley. I misunderstood. I thought you were referring to the first Travis trial.

Q. Just to be clear about it, I am talking about your testimony as to your conversations with attorneys before your testimony before the Grand Jury on the second occasion you were in Denver testifying before a Grand Jury.

A. I don't recall which attorneys those were.

Q. To refresh your recollection, to mention the name of Mr. Saar.

A. Who?

Q. Mr. Saar.

A. Mr. Saar? I don't recall him at all.

Q. Would it refresh your recollection to mention the name of Mr. Heflin?

A. I know Mr. Heflin, and I talked to Mr. Heflin on SACB matters. I don't know whether I did in regard to the Grand Jury matter or not.

Q. Would it refresh your recollection to mention the name of Mr. Worthington?

A. I have talked to Mr. Worthington too.

Q. At that time, Mr. Eckert?

A. I don't know whether it was at that time or not. I have talked to him several times I recall in regard to SACB. I don't know whether I talked to him in regard to this Grand Jury action or not.

Q. Would it refresh your recollection to mention Mr. Mitchell?

A. Well, I recall Mr. Mitchell as having been in the first Travis trial, but I am not sure whether he was one of the attorneys I talked to prior to the Grand Jury action or not.

Q. I don't believe the record is clear on this, Mr. Eckert, so, I will repeat the question: Would it refresh your recollection if I mention the name of Mr. Broome?

A. Again, Mr. Broome is one of the attorneys I talked to in SACB matters on a number of occasions including here in Denver, and I am somewhat confused as to which attorneys were handling which at that time before the Grand Jury.

Q. Now, in your conversations with those attorneys at that time—I am sorry, strike that. I am not clear, did you [fol. 471] say that you could not recall whether you talked to more than one attorney on that occasion?

A. I do not recall.

Q. In your conversations or in speaking to such an attorney or to attorneys at that time did you mention Travis or Mine-Mill?

A. I am quite sure I must have mentioned it, but, frankly, I don't remember the conversation, and, therefore, I don't remember whether I mentioned them or not.

Q. Did the attorney or attorneys at that time make notes as to the matters which you related to them?

A. I don't recall. I can't separate the specific meetings relating to that Grand Jury proceedings, so, therefore, I don't know whether they took notes or not.

Q. Would your testimony also be that you cannot recall you gave them anything in writing?

A. That's correct.

Q. Would your testimony also be that you cannot recall whether they presented to you anything which they had prepared for your inspection?

A. Well, of that I am sure, because that never happened in any case.

The Court: I think probably at this time we had better go ahead with the Jury and resume this later.

* * * * * * *

[fol. 481] Q. Mr. Eckert, you testified that you are presently employed by the United Automobile Workers, the UAW. When was it, again, that you first went in the employ of the UAW?

Mr. Kelley: I think this is repetitious, your Honor. I am quite sure that this was covered.

Mr. Witt: Oh, no, please.

The Court: I think this is preliminary. Proceed, Mr. Witt.

A. Shortly after seceding from Mine, Mill & Smelter Workers.

Q. When was that?

A. Well, I think, my recollection is that we voted to leave in June of 1948.

Q. And when was it shortly after you went into the UAW?

A. I don't recall exactly. My recollection is that somewhere between three, four, possibly somewhat longer, I am not sure.

Q. At the time you were an Executive Board member of Mine-Mill before you seceded what was your salary with Mine-Mill?

Mr. Kelley: The Government objects to that as being irrelevant and immaterial to these proceedings.

The Court: How is it relevant?

Mr. Kelley: It has no bearing on anything.

Mr. Witt: I want to show that the true motive for this man's leaving Mine-Mill and going to another union was not, as he tried to state in his direct testimony, but in order to feather his own nest and to make more money and to make life easier for himself.

Mr. Kelley: May it please the Court, those may be all laudable motives, but I do not see any relevancy.

[fol. 482] The Court: I will sustain the objection. I do not see any purpose in that.

Mr. Witt: I have another purpose in mind with respect to this man's connection with the UAW, your Honor, and I will proceed with that line.

Q. Mr. Eckert, when you went into the UAW along with you went the local die casting unions which had previously been affiliated with Mine-Mill, didn't they?

A. Well, not all of them.

Q. Some of them?

A. I beg your pardon, sir?

Q. Some of them?

A. Yes.

Q. And thereafter were there many elections conducted by the National Labor Relations Board, the NLRB, in which the two rival unions on the ballot were Mine-Mill, on the one hand, and UAW, on the other?

Mr. Kelley: May it please the Court, I think that is wholly irrelevant and a collateral matter to the issues in this case.

The Court: What is the purpose, Mr. Witt?

Mr. Witt: This man is affiliated with the UAW. I want to show that at all times since 1948 when this man first became affiliated with the UAW the UAW and Mine-Mill have been bitter rivals, have contested for representation of employees in several plants, and have appeared, that is, Mine-Mill and UAW have appeared on ballots in elections conducted by the NLRB, so that this man as an official of the UAW has an interest in furthering the position of the UAW and doing as much harm to Mine-Mill and Travis as he possibly can.

The Court: I do not believe that is relevant. I will sustain the objection.

Mr. Witt: I had a few other questions that would tie in with that line, your Honor, but in view of your Honor's ruling I suppose in order to conform to it I had better make an offer of proof rather than attempting to interrogate the witness. Whichever way your Honor directs I will do it.

The Court: You can proceed if you wish, and I will pass [fol. 483] on the questions specifically, or, if you desire to take it up in Chambers, you may do that.

Q. Mr. Eckert, isn't it true that at all times since you became affiliated with the UAW that the UAW has been the labor organization which has been the main and principal and constant rival to Mine-Mill in the East in the die casting and fabricating plants while another union affiliated with the AFL-CIO, the United Steel Workers of America, has been the main and principal rival of Mine-Mill in the West in the mines and the mills and the smelters in the nonferrous metals industry?

Mr. Kelley: May it please the Court, that is purely argumentative.

The Court: I will sustain the objection. I think this is far afield, because the rivalry between unions or something of that sort, there is no connection shown that the witness happens to be an official of some union that may be engaged in plant elections or something I think shows nothing that would be relevant to this case.

Mr. Witt: All right, your Honor. I have made the record on it.

Q. Mr. Eckert, in your testimony on direct examination you in this trial testified that before you left Mine-Mill in 1948 you knew the defendant Travis as a member of the Communist Party, and you testified that you knew other people connected with Mine-Mill as members of the Communist Party. Now, in connection with that testimony, Mr. Eckert, I will ask you whether you knew during the period while you were in Mine-Mill and when you knew Travis before 1948, whether you knew that Travis paid dues to the Communist Party at any time.

A. Yes, I can say that I knew he was paying dues.

Q. You can say?

A. Yes.

Q. I am asking you to testify from your knowledge on your recollection, Mr. Eckert, and, therefore, in view of your answer, I will ask you again whether you know from your own experience with Travis that he paid dues to the Communist Party.

A. Yes, I do.

Q. Were you present on any occasion when Travis paid dues to the Communist Party or any person representing the Communist Party?

A. Not that I can recall.

[fol. 484] Q. But you can say, you say that he did pay dues to the Communist Party?

A. Yes.

Q. Do you recall in what city that took place?

A. Well, he told me he belonged to the Party in Chicago.

Mr. Witt: I move to strike that. I didn't ask the witness to say what Travis told him.

The Court: That is the source of his knowledge. It is perfectly admissible as far as I know.

Mr. Witt: It is hearsay. I am not asking the source of his knowledge. I want him to answer my particular question, but this witness, I want him to stick to answering my particular question, if the Court please.

The Court: What was the question, Miss Marson?

(The reporter read the last question and answer.)

Mr. Witt: All I am asking him is the city. He can say Kalamazoo, New York City, Salt Lake City or Denver.

Mr. Kelley: I think the question is ambiguous whether it is where he acquired the knowledge or where he paid the dues.

The Court: Mr. Eckert, you can simply answer if you know what city it was in without stating any more.

A. I don't know what time he is referring to. What period?

Q. I am referring to the period between 1941 or '42—we don't know the date, because the witness has given different dates when he first knew Travis as a member of the Communist Party—until 1948 when the witness left.

The Court: You know what you are talking about. You can fix the date you are talking about.

Mr. Witt: He knows in my other question. He is just wasting time, your Honor. I asked him about the period he knew Travis as a member of the Communist Party. That is very clear in the record, and I am sure the ladies and gentlemen of the Jury remember that. So, I think he is just wasting time and interfering with my cross examination.

[fol. 485] The Court: I think the witness has asked—you asked him what city, and now he is asking that the question be made more specific what time you are talking about.

Q. All right, any time between January, 1942, and June, 1948.

A. Well, at a time during the period contained in your question he was paying dues to the Communist Party.

Mr. Witt: I move to strike that answer.

The Court: Let him answer. I do not know what the answer is.

Mr. Witt: The answer to the question—

The Court: Let him answer. Go ahead and complete the answer.

Mr. Witt: The question is about what city, your Honor, and he started to make one of his speeches.

The Court: He may be going to say he was paying dues in Portland, Oregon, or something else. I don't know what he is going to say. Go ahead, Mr. Eckert.

A. At that time in the City of Chicago.

Q. What time?

The Court: The time that was in your question.

Mr. Witt: Well, your Honor, I want to fix it more specifically with this witness if I may. I can't tell from that ambiguous answer. So, I would like to ask him what time between January, '42, and June of '48 the witness is referring to.

A. Sometime between 1946 and 1948.

Q. Now, with respect to Chase Powers I will ask you the same question that I started to ask you about Travis with respect to dues.

Mr. Kelley: May it please the Court—

[fol. 486] The Court: Let him finish his question.

Mr. Witt: I think Mr. Kelley knows what my question will be. I do not mind the interruption.

Mr. Kelley: I thought you had finished. I am sorry.

Q. Do you know that Powers paid dues to the Communist Party during the period after you came back from the Service at the end of 1945 until you left Mine-Mill in June, 1948?

Mr. Kelley: May it please the Court, that is collateral to the issues in this case and not proper cross examination.

The Court: No, I will overrule the objection. The witness can answer if he knows.

A. I don't have direct knowledge of that.

Q. Do you have any such direct knowledge about Al Skinner during the period you testified? Did you know him as a member of the Communist Party?

A. My recollection is that he did.

Q. Did you see him pay dues to the Communist Party?

A. No, I did not.

Q. I will ask you the same question with respect to Graham Dolan.

A. I don't have direct knowledge of him paying dues.

Q. Then, I will ask you, Mr. Eckert, whether you have direct knowledge of the payment of Communist Party dues by any person connected with Mine-Mill who you said in

your direct testimony you knew as a member of the Communist Party aside from the defendant Travis.

Mr. Kelley: May it please the Court—

Mr. Witt: I want to save time, your Honor.

Mr. Kelley: I think it would save more time if this line of questioning were abandoned. It is improper.

Mr. Witt: I am coming to the end of it. I tried to save time.

The Court: I think the point is, as he said in his direct examination, that certain persons were members of the [fol. 487] Communist Party, and now the cross examination is with respect to the witness's knowledge of that subject, but I do not think you can lump it together the way you have, Mr. Witt, even though the objective is laudable, and I think you are going to have to ask him specifically about specific individuals.

Mr. Witt: All right.

Mr. Kelley: May it please the Court, that is only one way of identifying a member of the Communist Party.

The Court: I think they have a right to test his knowledge with respect to whether these people were or were not, and this is one of the phases. It is not the whole phase, that is certain, but one element in the thing.

Mr. Witt: In view of your Honor's suggestion I wonder whether we could have a short recess now, and then I will try to prepare the questions so that the rest of the cross examination will be expedited.

Mr. Witt: May we have a Bench conference? I think perhaps we can shorten the remainder of the cross examination.

The Court: Yes.

(Conference at the Bench.)

In Open Court

KENNETH ECKERT, resumed the stand, and testified as follows:

Cross examination.

By Mr. Witt (continued):

Q. Mr. Eckert, before the recess I was asking you about your direct knowledge of dues payments by people you named in your direct examination as members of the Communist Party. I will ask you about Clinton Jencks whether you have any direct knowledge that he paid dues to the Communist Party during the period that you testified on direct you knew him as a member of the Communist Party.

A. Well, I don't recall any specific knowledge of that.

Q. Then, I will ask you the same question without repeating the whole thing, I think you know the question, about [fol. 488] William Gately who you said in your direct examination attended the meeting at Henry Horowitz's in 1947.

A. Why, I don't recall specific knowledge of Gately paying dues either.

Q. Now, Mr. Eckert, I will show you again Defendant's Exhibit C for identification being a copy of the minutes of the Executive Board meeting of Mine-Mill beginning February 6, 1946, and ask you to look at the first paragraph which lists the officers and Board members in attendance, and I will ask you to look at that and tell us whether your recollection is now refreshed as to whether or not Chase Powers was present on that occasion.

A. I don't recall whether he was present or not.

Q. And that document doesn't refresh your recollection?

A. No, it does not.

Q. Now, Mr. Eckert, I want to ask you about the time or the date of the meeting at Henry Horowitz's home in Chicago in 1947 before the St. Paul convention. Mr. Eckert, in answer to Mr. Kelley's question about when this meeting at Horowitz's took place last week Mr. Kelley's question is as follows: "Question: When or how long prior to the St.

Paul convention did this meeting occur? Answer: Well, it was just prior to the convention, I believe not more than a few days before the convention opened." Now, Mr. Eckert, I will ask you whether you can fix that date a little better. If you want to do it by reference to the dates of the St. Paul convention, I would have no objection to it.

Mr. Witt: Your Honor, if I may say to the witness, I have a copy of the proceedings of the St. Paul convention, Defendant's Exhibit D for identification which the witness identified the other day which bears the date. I will be glad to show him that to refresh his recollection.

The Court: You can show it to him and ask him if it refreshes his recollection.

Q. Mr. Eckert, I will ask you to look at Defendant's Exhibit D for identification and ask you whether that refreshes your recollection as to the dates of the St. Paul convention.

A. Yes, this refreshes my recollection as to the dates of the convention.

Q. And will you tell us what those dates were?

A. August 25 to August 30.

Mr. Witt: Just so the record will be clear and the witness [fol. 489-499] perhaps won't be misled I want to show these to Mr. Kelley first.

(Document marked Defendant's Exhibit F for identification.)

Q. Mr. Eckert, I show you Defendant's Exhibit F for identification which purports to be a copy of the minutes of the Executive Board of Mine-Mill in St. Paul during the period from August 20 to August 24, 1947. I will ask you to look at that and tell us whether that refreshes your recollection that there was a Board meeting in St. Paul in August, '47, before the convention opened on the 25th of August.

A. Yes. My recollection is that there was a Board meeting prior to the convention.

Q. And do you recollect the date on which that Board meeting began?

A. I notice that date there. I think it is August 20.

Q. Would that be your present recollection, that it was August 20?

A. Well, I don't recollect the date, but it says August 20 there.

Q. Now, coming back to your testimony about the Horowitz meeting on direct examination last week when you said your best recollection was that it took place a few days before the St. Paul convention, did you intend by that answer to say that it took place a few days before August 20 when the Board meeting in St. Paul began or a few days before August 25 when the convention opened?

A. I meant what I said, before the convention.

Q. Now that we have the date of the convention, August 25, I will ask you if you cannot be a little more specific about the date of the Horowitz meeting.

A. Well, the Horowitz meeting was just shortly before we left Chicago to go to the Board meeting which I estimated as a few days before the convention.

Q. Do you recall when you left Chicago to go to St. Paul?

A. No, not exactly.

Q. When you say the Horowitz meeting took place a few days before you left Chicago, would you then be able to fix the date a little more precisely?

A. Well, I didn't say that it took place a few days before I left Chicago.

Q. I am sorry. I misunderstood you. I apologize. Will you tell me again what you said about leaving Chicago? I must have been confused.

A. The meeting at the Horowitz house, as I understand it and as I testified to it, took place a few days before the convention.

Q. And do I understand your answer to be it took place [fol. 500] a few days before August 25?

A. Yes.

Q. You were in St. Paul for the Board meeting beginning on August 20, weren't you?

A. My recollection is that I was.

Q. Then, I will ask you again—I may have asked you but I am confused—whether the Horowitz meeting took place a few days before August 20.

A. I don't recall when exactly it took place. My recollection is that it took place, I characterize it as a few days before the convention. That is my recollection of it.

Q. And I think you already said you don't remember on what date it was that you traveled to St. Paul?

A. No, I don't.

Q. Do I take it from your answers, and correct me if I am wrong, that you went to St. Paul by way of Chicago—I am sorry, I withdraw that. That is confusing. At that time, Mr. Eckert, your office was in Cleveland, wasn't it?

A. The office was there.

Q. Your office?

A. My office, yes.

Q. Now, in getting to the St. Paul convention did you go directly from Cleveland to St. Paul, or did you go through Chicago?

A. I really don't remember whether I left from Cleveland or where.

Q. To refresh your recollection—I withdraw that. I didn't ask you where you left from. I asked you if you traveled directly to St. Paul, directly from Cleveland or whether you traveled to St. Paul through Chicago with or without a stopover in Chicago.

A. I lost you somewhere there.

Mr. Witt: The reporter will read the question.

(The reporter read the last question.)

The Court: Do you understand the question?

A. I don't remember where I left from, so, I can't remember whether I left from Cleveland through Chicago by way of Duluth or St. Paul or wherever that was you stated.

Q. Well then, I will ask you whether you recall how you traveled to St. Paul from wherever you traveled, did you travel by car, by train, or by plane?

A. That I don't remember.

Q. And you don't remember what city you left from then to go to St. Paul?

A. No, I don't remember where I had been prior to that.

Q. Then, to refresh your recollection didn't you arrive

in St. Paul with another person who was affiliated or con-
[fol. 501] nected with Mine-Mill or was an employee of Mine-Mill?

A. I don't remember how I went from Chicago to St. Paul or with whom or with anyone.

Q. Now, you just said you don't remember how you went from Chicago to St. Paul. That is what I was trying to get you to answer before, what city you went to St. Paul from. You are saying now that your recollection is refreshed that you went to St. Paul from Chicago?

A. No. I understood you to ask me how I traveled from Chicago to St. Paul, and my answer was as far as I can recall that I don't know how I traveled there. I don't know whether that is the way I went, directly or how I went.

Q. Either you misunderstood me or I misunderstood you. It is your answer now that you traveled from St. Paul to Chicago?

A. No. I don't remember where I had been just prior to arriving in St. Paul.

Q. Then, Mr. Eckert, getting back to my question as to whether you had a traveling companion—

The Court: He said once he didn't recall.

Mr. Witt: I am asking a different question, your Honor, related to that, and I wanted the record to be very clear.

Q. Getting back to the question I asked you as to whether you had a traveling companion I will ask you whether it is not true that you flew, that you took a plane from Chicago to St. Paul on August 19, the day before the Board meeting opened, and that a person employed by Mine-Mill traveled with you on that plane from Chicago to St. Paul.

A. I don't recall whether that is correct or not.

Q. Normally would it be true that, if you had a Board meeting—I withdraw the question. Mr. Eckert, to refresh your recollection further I will ask you first, the National Office of Mine-Mill was in Chicago at that time, wasn't it?

A. Yes, it was.

Q. And did you know a woman working in the office of Mine-Mill in Chicago in August, 1947, by the name of Marion Kettle?

A. Yes, I did.

Q. Do you remember what work she did in the office?

A. She was a secretary in the office.

Q. Now, I will ask you whether it is not true that on August 19, 1947, you didn't fly to St. Paul with Marion Kettle on the same flight in the same plane.

A. Well, I don't recall whether I flew. If I did, she may [fol. 502] have been on the plane together with other Mine-Mill people. I don't know.

Q. I am trying to refresh your recollection by asking you whether the fact—

The Court: He has answered the question.

Mr. Witt: Well, I could be wrong. I want to ask it from a slightly different point of view.

The Court: He has answered the question. If you have another question, propound it.

Q. Now, Mr. Eckert, you knew Marion Kettle rather well, didn't you?

Mr. Kelley: May it please the Court, it is immaterial how well he knew her.

The Court: He said he knew her, and the objection will be sustained.

Mr. Witt: This is a most important subject, your Honor.

The Court: He said he knew her, and he answered your question. His acquaintance with her would have no bearing on the matter before the Court.

Mr. Witt: Since he still persists in saying that he doesn't recall whether he flew to St. Paul, I think I am entitled to try to refresh his recollection. I have more to say on this, your Honor, but I think we should discuss it.

The Court: The objection will be sustained to that question. You may proceed.

Mr. Witt: Well, I have an offer of proof to make on this, and it will be highly improper for me to make it in the hearing of the Jury, your Honor.

Mr. Kelley: Can't we go along with something else and take it up at the noon recess?

The Court: Yes, we will take it up then. You can proceed [fol. 503] with the cross examination.

Mr. Witt: All right, your Honor, subject to this current matter I would like to discuss in Chambers we are done with our cross examination of Mr. Eckert. Now, we have several other matters to discuss with your Honor it appears to me. I do not want to be presumptuous, your Honor, but perhaps a short conference in Chambers would clear the schedule and your Honor could handle the problem of the Jury with the greatest convenience to everybody.

The Court: The Government has their next witness available, I expect?

Mr. Kelley: Yes, we are ready.

Mr. Witt: Before the Jury is excused may we approach the Bench?

The Court: All right.

(Conference the Bench.)

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In Chambers

Colloquy Between Court and Counsel

The Court: Let's consider these matters that came up since the last conference.

Mr. Witt: First, on this current subject on cross examination, your Honor, I will withdraw the pending question to which your Honor sustained the objection, and I will try to complete my examination on that subject in another way.

The Court: You are not through with cross examination yet?

Mr. Witt: I will be when I finish this, so, at 2:00 o'clock when the Jury comes back I think I will be able to finish this matter in another way within a few minutes with the witness.

Mr. Kelley: You don't want to make your offer of proof?

Mr. Witt: Not now. It may be depending on the Court's [fol. 504] ruling we may want to make an offer of proof after we ask other questions.

The Court: Was there anything else held in abeyance here this morning?

Mr. Witt: May I summarize the situation as we see it, your Honor?

The Court: Yes.

Mr. Witt: And what we have in mind, if your Honor agrees. First, we have the problem of completing Mr. Deikman's examination of Mr. Eckert with respect to Eckert's relationship with Government attorneys. Then, we have one main division of our Chambers examination of the witness left that has to do with his Grand Jury testimony. I was talking about the question of Grand Jury testimony. Mr. Deikman has been asking him, of course, not what he testified to before these Grand Juries, merely his talks with the FBI and attorneys and so forth in point of time in reference to his Grand Jury appearances. What we will seek to do in Chambers, your Honor, on our motion for the production of this man's Grand Jury testimony is to complete our record on that. The record on that will consist of two parts, one, the cross examination of the witness in open court, and, two, further cross examination which we want to continue in Chambers on material which would not at this stage be proper before the Jury but which we think we are entitled to do in order to complete our record on that issue.

The Court: Well, I am in considerable doubt about this second phase of the thing. What has happened in court, of course, we can take that up, but I do not know quite what you mean. It may be better to wait and see what you are trying to develop, but I would like to know what the law is on that. I have already held, I think at least that was my intention, that 3500, of course, didn't cover Grand Jury testimony. I have already held that. I also held that you had laid no foundation for production otherwise, and I don't know what you are trying to do now. What is it you are trying to do? What is it so the Government will know so they can look up the law a little bit rather than have a hiatus on that?

Mr. Witt: I will try to make as concise a statement as possible on that, what we are trying to do. As the record [fol. 505] now stands, as I know it, your Honor has denied our motion for production of this man's Grand Jury testimony which we made at the end of his direct testi-

mony. At that time we agreed, your Honor, with the prosecution, there is no issue of law as to this point, that that does not come within Section 3500. So, as I know it, there is no issue as to that.

We made our demand under the cases and particularly under the Jencks case and that Rosenberg case which I cited in the Third Circuit, but, your Honor denied that motion. Now, we are proceeding to the next stage of that issue as we see it, and our position is that even if your Honor is right in the denial of our motion before cross examination as indicated by the Rosenberg case, we think the cases at least support, would support a motion by us based on inconsistencies and contradictions in this man's testimony which we have already shown and which we will show by further examination in Chambers, and the cases support the conclusion that at the very least your Honor should look at this man's Grand Jury testimony, should examine his Grand Jury testimony on the matters about which he testified both on direct and cross examination, and, if your Honor finds further inconsistencies and contradictions, then under the cases we are entitled to have those parts of his Grand Jury testimony turned over to us for further cross examination.

Finally, we think the cases support our position that where you have a situation which is fairly complicated like this one with respect to different items of testimony and therefore where the burden on the Court in examining the Grand Jury testimony would be too great and where also it would be unfair to the defense not to let the defense examine that testimony for inconsistencies and contradictions the cases support our position that the testimony should be turned over directly to the defense without prior examination by the Court, and that is why we want to complete this.

The Court: What cases, if you are willing to state at this time so that the Government may look into them and save delay of having to postpone the argument until they have had a chance to look into the law, what cases do you wish to state you rely on as giving the right you are asserting now? Do you have any key cases now?

[fol. 506] Mr. Witt: I am sorry, I left my file in court.

I didn't know we were going to get in to discussing the law.

Mr. Kelley: We have submitted a brief on the thing that probably would cover most of the issues. I do not think it is a question of law. It is a question of the interpretation of the facts in this case and applying the law.

The Court: I wonder if there is any case that touches on some factual situation that they think is comparable with this case.

Mr. Witt: I think I can answer that without my file, your Honor, and I think the area of agreement between us and the other side is rather narrow. I may be wrong, but let me try to state it. We, of course, have a copy of the Government's memorandum on that point, and, as we read it, the Government concedes that, if the defense shows an inconsistency or contradiction in open court, that the cases hold that the Court may examine the witness's Grand Jury testimony on that particular point, and then, if the Court finds the Grand Jury testimony is also inconsistent and contradictory of his direct testimony, then the cases hold that that part of the Grand Jury testimony be turned over to the defense.

Now, the area of disagreement, if I read the Government's memorandum correctly—

Mr. Kelley: We do not even agree on what you have said already.

The Court: I think we had better defer the argument. I will read that brief. You left it here the other day. I will read it during the noon hour and, so, I think we had better be back at 1:00 o'clock.

Mr. Kelley: I might say, your Honor, along that line, that it is our position briefly that they have got to have the witness state that he made a statement in his testimony that was inconsistent with what he testified to before the Grand Jury or bring someone else in or show from his lips that he told somebody else something that was inconsistent with what he told the Grand Jury, and I would further say that the fact that a person might put one individual at a [fol. 507] particular meeting testifying one place and leave him out at another would not be an inconsistent statement as to a material issue. The issue in this case isn't whether

Bryson was at that meeting in 1948 or not. If he was put in one time and left out another, it has no bearing on the guilt or innocence of the defendant, and it is not an issue in this case. If you had left Mr. Travis out of these meetings part of the time and put him in another part of the time, that would be the type of inconsistency that in my opinion would be of a material nature and might give them some basis for their argument.

The Court: Well, perhaps we had better wait until the matter comes up to argue it.

Mr. Witt: May I say just one word. I do not think I have said it clearly yet. But Mr. Kelley's statement brings it to mind, his reference to Bryson. Your Honor, that is exactly the kind of further material, not that it is very extensive, that we think would be more properly gone into in Chambers in support of this motion, let me illustrate, and also not to burden and confuse the Jury. Take Bryson, your Honor, I cross-examined this man about Bryson when Eckert testified before the SACB, and I made an effort to bring out why it is that he mentioned Bryson on a particular occasion and not on another, and, therefore, I made an effort to show by that evidence that these inconsistencies as illustrated by the Bryson inconsistency, that is, putting him in one place and leaving him out another, go to the very foundation of this man's testimony about Travis and everything else he said. This is not a case of lapse of memory which is, of course, normal. We want to show that this man knows what he is doing, perhaps not at all times, when he puts a name in and leaves a name out may be normal memory, but we want to show on occasion after occasion this man deliberately puts a name in, and we think this also ties in to your motion for mistrial in connection with the advice the prosecution gave him about his testimony in the Jencks case and on the trial of this case about the Horowitz meeting in '47, the Travis meeting in '48, and about the use of the word "church", it is all a part of one pattern.

The Court: Well, let's start at 1:00 o'clock.

In Chambers

The Court: Mr. Deikman just stated that Mr. Witt would [fol. 508] not be present here in Chambers for the moment at least. He is preparing some notes in connection with further cross examination of the witness, as I understand, and said that we may proceed here without his presence. That's right, isn't it, Mr. Deikman?

Mr. Deikman: That's correct.

The Court: You may proceed.

KENNETH ECKERT, testified as follows:

Examination.

By Mr. Deikman:

Q. Mr. Eckert, before testifying in this trial, in other words, the second Travis trial, did you have occasion to be interviewed by any United States Attorney or any attorney employed by the Government?

A. Yes.

Q. And which attorneys were those?

A. Well, Mr. Kelley, Mr. Vincent, Mr. Crandall.

Q. Now, how long have you been in Denver for this trial?

A. I arrived here a week ago last Friday.

Q. How many days was that before the trial commenced, three days?

The Court: The calendar will show that. That was on the 10th, and the trial started the 13th.

A. That is my understanding, your Honor.

Q. Now, did you speak or were you interviewed by one attorney more than any other?

A. Yes.

Q. Which attorney was that?

A. Mr. Kelley.

Q. And in your interview by Mr. Kelley did he question you concerning your testimony in this trial?

A. He questioned me concerning testimony, yes.

Q. Now, did he at the time that he was interviewing you take notes as to what your testimony was going to be?

The Court: Well, how would he know what the notes were? You can ask him if he took notes.

Q. Did he take notes?

A. I don't recall whether he took notes or used notes from before.

Q. Did you have occasion to see notes from before? [fol. 509] A. Mr. Kelley referred to some notes. I don't recall, I never saw the notes, I don't know what they were.

Q. Did he question you from those notes?

Mr. Kelley: That is not material to this inquiry.

The Court: I do not think so.

Mr. Deikman: In my opinion it was.

The Court: He could have made notes from the transcript in the first trial. We all know that was taken. Bring it down to something that is within this witness's knowledge that would bring it within the category of the statute.

Mr. Deikman: You see it is kind of difficult to get my point across to the Court on this, because at no time have we really gotten down to defining "statement" in relation to notes or memoranda or transcriptions made by the United States Attorney's Office.

The Court: You can ask him—

Mr. Kelley: I think that Mr. Witt made a distinction between the notes and work sheets of the attorneys and statements signed or adopted by the witness. He made that for the record early in the game.

The Court: Well, I think he can proceed, but I do not think this question is proper. You may proceed to interrogate about what happened.

Mr. Deikman: For the record, your Honor, I think it should be stated in the opinion of counsel for the defense even the work product of an attorney is producible under Section 3500 although we do make a distinction between statements signed by the witness and other kinds of notations, writings, or memoranda. But that is only for the purpose of distinguishing work product as such from statement.

The Court: You can proceed and interrogate about what happened, and those matters can be gone into later. Find out what so far as this witness knows took place.

[fol. 510] Mr. Deikman: All right. Now, for the record and for the purpose of the record I would like to ask him whether he was questioned from such memoranda.

The Court: You need not answer that question. I just ruled on that a moment ago. That has no relation to what you are talking about. It doesn't matter what they used to question him from. The point is his connection with the matter. If they used the transcript in the other trial, what bearing would that have on this thing?

Mr. Deikman: I don't know. It is clear that they did use the transcript, and this is sort of a preliminary question, your Honor.

The Court: Well, proceed.

Mr. Kelley: That is what it is, preliminary.

The Court: You are assuming furthermore that he was questioned, and the import of the witness's testimony is they discussed the testimony or went over the testimony or something equivalent to that. I have heard nothing to indicate there was any categorical questioning like the witness was on the stand or anything of that sort. If you wish to develop what happened, you may do it.

Q. Mr. Eckert, were you questioned by Mr. Kelley regarding the subject matter which was in substance your direct testimony in this case?

A. I was asked questions by Mr. Kelley some of which I believe I testified to on direct.

Q. Now, directing your attention specifically to questions that he asked did you observe whether he made any memorandum regarding your answers?

A. I don't recall whether he did or not.

Q. All right. Now, did you make any statements to Mr. Kelley, oral statements other than statements that you made in response to questions?

Mr. Crandall: I object, your Honor. I do not think that is relevant.

The Court: I do not think that question is intelligible to me, and I do not think it is to the witness. So, you need not answer that. You can reframe the question.

[fol. 511] Q. Mr. Eckert, you have stated that you answered Mr. Kelley's questions. Now, did you in your in-

terview with Mr. Kelley, did you state anything in relation to what you testified on direct other than responses to questions? In other words, did you volunteer information?

Mr. Kelley: That is immaterial.

The Court: Let him answer. I do not see the relevancy at all, but I think we will make progress if we let him answer if he can.

A. I may have spoken when I wasn't spoken to. It might have concerned something on direct. I don't know whether it did or not.

Q. All right, in other words, what you are saying is that mainly it was questions and answers, is that correct?

Mr. Kelley: I don't think that reflects his testimony at all.

The Court: He didn't say that at all. Go ahead with your questions and do not assume something.

Q. Did you provide anything in the form of a written statement by you in your handwriting to Mr. Kelley?

A. No.

Q. Did you provide anything in writing to Mr. Kelley at all?

Mr. Kelley: That is immaterial under the statute.

The Court: No, I will let him answer that.

A. No. This is a case where I brought none of that material I referred to I may have brought to other trials.

Q. Did Mr. Kelley bring to you any document for your approval or inspection?

A. No.

Q. Now, were you interviewed separately by Mr. Vincent?

A. No, not that I can recall.

Q. Were you interviewed separately by Mr. Crandall?

A. Not that I can recall.

Q. And, as I understand it, these were the only three attorneys you spoke to before your testimony in this case?

[fol. 512] Mr. Kelley: Well, how far back are you going?

Mr. Deikman: Strike that question.

Q. Subsequent—strike that. In relation to your preparation for your testimony in this trial did you speak to any

other attorneys besides the three that we have already mentioned?

The Court: Well, again, that might go back to the beginning of time. Ask him, he said he came here on Friday, the 10th of January, ask him if he talked to anyone.

Q. In relation to your preparation for trial in this case, your testimony in this case and since Friday and before trial have you spoken to any other attorneys for the Government in relation to Travis or Mine-Mill other than Mr. Kelley, Mr. Vincent or Mr. Crandall?

A. No, to the best of my recollection I have not.

Q. Did you at any time that you were interviewed by Mr. Kelley and/or any other attorneys in relation to this time that I am talking about in the previous question see your statements were mechanically transcribed?

A. No, I did not see any such contrivance.

Q. At the time that I am talking about, in other words, two weeks ago, in which you were interviewed by Mr. Kelley and/or any other attorney was a stenographer present?

A. No.

Q. Was anyone other than a stenographer present who took notes outside of Mr. Kelley, Mr. Crandall or Mr. Vincent?

A. I observed no one taking notes during these interviews.

Q. Now, previous to last Friday at which time you arrived in Denver had you spoken to any attorneys in relation to your testimony, preparation for that testimony specifically for this trial?

A. I spoke to an attorney prior to this trial in—prior to last Friday in relation to this trial or, rather, Friday, the 10th.

Q. Yes, the 10th.

Mr. Witt: I think Mr. Deikman misspoke himself. He spoke about the witness's arrival last Friday.

Mr. Kelley: The record is clear on it.

Q. You understand I am speaking about the 10th?

A. Yes.

[fol. 513] Q. You did speak to an attorney prior to the 10th of this month, is that right?

A. Yes.

Q. Was that an attorney employed by the United States Government?

A. Yes.

Q. What was his name?

A. Their names were Mr. Vincent and Mr. Crandall.

Q. And where was that interview?

A. I had spoken with them. I presume you mean telephone too?

Q. Was it both telephone and private interviews?

A. Yes.

Q. Now, in relation to your private interviews where did that take place?

A. Grosse Pointe, Michigan.

Q. I presume that was in the office of Mr. Vincent or Mr. Crandall, you can correct me if that is wrong.

Mr. Witt: That is the witness's home.

The Court: Ask him where it was, would be the very simple way to find out.

A. My home.

Q. Was anyone else present there besides yourself, your family?

The Court: He hasn't said anything about his family being there.

Mr. Deikman: I am trying to exclude anybody but Government agents.

The Court: Ask him who was there.

Q. Was anyone else there besides—strike that. Did anyone employed by the United States Government accompany Mr. Vincent and Mr. Crandall?

A. No.

Q. Did Mr. Vincent or Mr. Crandall take notes in regard to your interview at that time?

A. No, they did not.

Q. Was any mechanical device used to transcribe your statements at that time?

A. It would be very hard for me to believe that there was. I am sure that there was not.

Q. Did you provide Mr. Vincent or Mr. Crandall at that time with anything in writing?

A. No, I did not.

Q. Now, you spoke of telephone conversations. With whom did you speak over the telephone?

A. At one time I spoke with Mr. Crandall I believe, and [fol. 514] on the second occasion I spoke with Mr. Kelley.

Q. Where were you speaking from?

A. When I spoke with Mr. Crandall I don't remember whether I was at home or in the office in Detroit.

Q. That was over long distance telephone?

A. Well, he was calling from Washington, I believe.

Q. And was it long distance telephone with Mr. Kelley?

A. Yes, I believe Mr. Kelley was speaking from Denver.

Q. In either of those interviews or conversations were you advised that a mechanical transcription or device was being used?

A. No.

Q. Now, in relation to your interview or interviews with Mr. Crandall and Mr. Vincent in Grosse Pointe was that more than one interview?

A. No, just one interview.

Q. How long did that interview last?

A. Well, I think, I don't think it was an interview. Maybe it could be called that. They were there several hours I believe.

Q. How long?

A. Several hours I believe to the best of my recollection.

Q. Now, on what date did that take place, do you recall?

A. No. It was a week or two before I came here.

Q. Mr. Eckert, I believe you stated that in your opinion it was not an interview. What would you call it?

A. Oh, sort of a chit-chat possibly.

Q. Now, after that chit-chat did they exhibit anything in writing to you based on your chit-chat with them?

Mr. Vincent: If your Honor please, they have shown no relevancy in this yet.

The Court: What he means by that, did you prepare a statement and submit it to him, I gather is what he means.

A. No.

Q. Is it your testimony, Mr. Eckert, that Mr. Vincent and Mr. Crandall traveled from some other point in distance from Grosse Pointe—

The Court: He hasn't testified to anything like that. They showed up in Detroit, where they came from—or Grosse Pointe—where they came from is immaterial.

Q. Did Mr. Vincent or Mr. Crandall inform you of where they were from?

[fol. 515] Mr. Kelley: That is objected to.

The Court: Well, what is the point? I would assume that they were, came from Washington whether directly or indirectly, and what is the difference where they came from?

Mr. Deikman: Well, maybe we can rephrase the question so that your Honor can rule on it.

Q. Did Mr. Vincent and Mr. Crandall come to Grosse Pointe just simply to chit-chat with you, Mr. Eckert?

The Court: That calls for a conclusion on his part. He has testified to the fact that they were there, and that is all that is relevant.

Q. Do you recall testifying before the SACB?

A. Yes.

Q. And when was that?

Mr. Kelley: That is all in the record, I think.

The Court: What is the point about the time? You have the transcript, and I think they have been referred to by specific dates.

Mr. Deikman: That is what I mean, your Honor. The witness knows, and I thought we might be able to pin this down to some particular time.

Q. Before you testified before the SACB.

The Court: He said he talked to these gentlemen about a week or two before he came to Denver.

Mr. Deikman: That's correct.

The Court: What is the point about all of this?

Mr. Deikman: I am now going to the SACB.

The Court: Proceed. Ask him what you wish to ask him.
Mr. Deikman: All right.

[fol. 516] Q. Mr. Eckert, do you recall that you have testified that you did previously testify before the SACB in March and April of 1957?

Mr. Kelley: The record shows that.
Mr. Deikman: I think the witness can answer.
The Court: I think he has answered it about 40 times, is the point I am trying to make. I do not think there is any question about it.
Mr. Deikman: If there is no question about it, we can go to the next point.

Q. Before you testified before the SACB did you talk to any attorneys concerning Travis and/or Mine-Mill such attorney being an employee of the United States Government?
A. Yes.
Q. Now, were there one or more attorneys?
A. There were, let's see, there was more than one.
Q. Can you tell me their names?
A. Well, at various times there were Mr. Broome, Mr. Heflin, Mr. Worthington.

Mr. Kelley: This has already been gone into before.
Mr. Deikman: Not in relation to this period, your Honor.
The Court: No, I do not believe they have.
Mr. Kelley: He named the attorneys.
Mr. Witt: He anticipated that this morning. That is what Mr. Kelley is thinking about, another connection.
The Court: I do not believe this precise matter is in the record. Proceed.
Mr. Kelley: I am sorry.

Q. Did you also talk to Mr. Saar?
A. I don't recall the name.
Q. Now, you stated I believe that you talked to them over a period of time, so, there was more than one occasion, Mr. Eckert?
[fol. 517] A. That's right.
Q. How many occasions would you say there were?
A. Well, I don't know, quite a number. I would hate to guess. I don't know.

Q. With which of the attorneys that you have mentioned, Broome, Heflin or Worthington, did you spend the most time in regard to Travis and/or Mine-Mill?

Mr. Vincent: The Government objects to that.

The Court: I will sustain the objection. Why don't you ask him with reference to whether any notes were made or something that has some relationship to this thing by any of them and then ask him who made the notes? I do not see that this great detail is adding anything to the situation. What you are ultimately concerned with is what was done in the way of something that might come within the category you are talking about.

Mr. Witt: If the Court please, may we confer for a moment, and then I think we can probably shorten this considerably now, wind it up.

Mr. Deikman: I think we can shorten this considerably, your Honor.

Q. In what cities did your conversations with Mr. Broome, Mr. Heflin, and Mr. Worthington take place?

A. Well, I recall Washington, D. C., here in Denver. I don't recall whether there were any other cities.

Q. I am speaking in relation to your testimony, your preparation for testimony before the SACB. Is that what you mean by referring to Washington and Denver?

A. Yes.

Q. Now, were those the only two cities in which you held those interviews or conversations?

A. Those are the only two that I recall.

Q. Where was the interview in Washington conducted, or interviews?

A. We met in the Justice Department Building. I think that is the only place that we held any interviews.

Q. Now, in connection with your interviews in Washington, am I correct in understanding your testimony as being that there was more than one interview?

A. Yes.

Q. How long would you say all the interviews with Broome, Heflin, and Worthington were in point of time?

[fol. 518] Mr. Vincent: The Government objects to that, your Honor.

The Court: Oh, I think I will let him answer.

A. I don't know how long it was.

Q. Would you be able to give us an estimate as to whether it took just a few minutes or several hours or several days?

A. Well, the interviews ran more than several days, six or seven days or more. I don't recall.

Q. I don't believe you understood me, Mr. Eckert. I don't think you are being fair to yourself on this. You don't mean to say you were interviewed for seven days in point of time straight, do you?

A. No, I didn't say that.

Q. Assuming that there were seven days which you seem to approximate how many hours each day were you interviewed?

A. I don't recall.

Q. Would you be able to estimate that it was about a couple of hours each day or more than that?

Mr. Vincent: If your Honor please—

A. Sometimes it may have been 15 minutes or sometimes three hours. I don't recall.

Q. Now, in your interview or interviews in Washington, I mean in Denver, was that more than one interview?

A. Yes.

Q. And am I correct in remembering your testimony to be that that was solely with Mr. Broome?

A. No, it wasn't.

Q. Was there also Saar, Heflin—strike that.

The Court: Ask him who else was present.

Q. Who else was present, Mr. Eckert?

A. I recall occasions when Mr. Broome was present and Mr. Heflin. I just don't place Mr. Saar.

Q. Was there anyone else?

The Court: You have asked him that. Proceed and ask him something new.

[fol. 519] Mr. Deikman: I didn't understand his answer to be final. I will go to something else.

The Court: You asked him who he talked to about the case and you have gone over all of these names and everything else.

Mr. Deikman: I am trying to establish whether Mr. Worthington spoke to him in Denver.

The Court: He said he didn't recall the name.

Mr. Deikman: He didn't recall Mr. Saar but he recalls Worthington.

Q. Was Worthington in Denver?

The Court: He has testified who was present up to date. Go ahead with the testimony.

Q. How many days did you spend in Denver in regard to your interviews with Mr. Broome and Mr. Heflin?

A. Well, I answered previously six or seven days. I was referring to six or seven days total time spent with these attorneys in regard to SACB both in Denver and in Washington.

Q. How long before the SACB hearings was it that you were in Denver speaking to Mr. Broome and Mr. Heflin?

The Court: What possible relevance could that have now?

Mr. Deikman: So we can establish there was a statement on a particular day we wish to move the production of.

[fol. 520] The Court: I think one of the things you had better establish first is that there was a statement before we get to the specific date.

Mr. Deikman: All right.

Q. Now, at the time you were being interviewed by these attorneys that you have mentioned did they take notes?

A. I believe Mr. Broome took notes.

Q. Did you provide anything in writing to Mr. Broome?

A. My recollection is that I provided Mr. Broome with the type of documents that I previously described here—Marxist literature and so on.

Q. Was any mechanical transcription made of your statement at that time?

A. Not that I know of.

Q. Was a stenographer present?

A. No.

Q. Did they at any time in these interviews produce anything for your approval in writing?

A. No, not that I know of. I am not sure what you mean

by approval. What Government exhibit they may have shown me I don't know.

Q. When you say Government exhibit was that a Government exhibit that would contain any of your testimony?

A. No, I don't recall of any such exhibit as that.

Q. Would that exhibit contain any narrative matter by you?

A. What?

Q. Would that exhibit contain any narrative matter made by you?

A. I don't recall whether any of the Government exhibits contained that or not.

Q. Did any of these Government exhibits contain any statement by you?

A. That I don't recall.

Q. Now, you didn't understand what I meant by approval, so, I will state it this way: Did the Government attorneys prepare anything as a result of their interview with you which they reduced to writing and presented to you for your inspection?

A. Not that I can recall.

Mr. Deikman: That completes our examination on this point.

[fol. 521] The Court: Do you want to ask Mr. Eckert any questions?

Mr. Kelley: No, I do not have any to ask him.

The Court: What is it you wish to make for the record?

MOTION TO DIRECT GOVERNMENT TO PRODUCE ANY STATEMENTS NOT ALREADY PRODUCED RENEWED AND RULING THEREON

Mr. Witt: Your Honor, just to make our record in the wind-up of the in-Chambers interrogation of the witness on the question arising under Section 3500 we renew our motion that the Court direct the prosecution under Section 3500 to produce any statements not already produced pursuant to the original order of the Court in the possession of the Government bearing on the subject matter of this man's testimony whether it is in the possession of the FBI

or attorneys in the Department of Justice, attorneys of the Government elsewhere whether in the possession of Committees of Congress, whether in the possession of the Immigration and Naturalization Service, and whether in the possession of any department, agency or bureau of the Executive Branch of the Government.

The Court: Where is there anything in this evidence that we have heard here that you have offered that would establish the existence of anything that would come within the realm of 3500?

Mr. Witt: What we have established is that this man over the years has talked again and again and again to Government agents of one kind or another the way we define Government agents. It is clear from this man's answers although, of course, the prosecution won't agree and perhaps your Honor won't, that he is being evasive as to many of these talks he had with these Government agents. For example, it is simply incredible to ask anybody to believe that Messrs. Vincent and Crandall would go to Grosse Pointe, as I assume your Honor apparently understands, [fol. 522] from Washington to interview this man at his home about the testimony he was to give in this trial without there being some document which eventuated from that incident.

Now, if we are wrong about that, Messrs. Vincent and Crandall are here, they are colleagues of Mr. Kelley of the prosecution of this case, and they can give us the answer to that without being reticent about something we are entitled to know, and, if they give us the answer, they are members of the Bar and attorneys employed by the Department of Justice, that will be the answer. If the answer is, "No, there is nothing in writing," that is one thing. But if the answer is "yes" we want to know if anything in writing that came from that interview in Grosse Pointe was delivered to your Honor in connection with our demand under Section 3500.

Finally, just to reiterate our position on the remaining issue, we still say that not all documents in the possession of the attorneys are considered work product even if it can be assumed that everything called work product is subject to production.

The Court: I think you are talking in generalities. What I want to know, where is there anything established in this evidence from this witness, the existence of anything that would come within the definition of 3500 as being something that the Government would be obliged to produce?

Mr. Kelley: Well, in this statement for the record in addition to the fact that there is no showing that there is anything, that to my knowledge, and I have been assured that there is no further material that is producible, I think Mr. Vincent can make a statement as to this specific incident at Grosse Pointe if that would make Mr. Witt happy. Paul, you can state whether or not there was a statement made up there or any written statement of any kind taken or adopted.

Mr. Vincent: I think I can make such a statement, Mr. Kelley, if your Honor please. I do not think it was established, number one, in the testimony of this witness that this was an interview pertaining to this case in the respect which Mr. Witt is talking about. Number two, I can state to your Honor that I did not take any notes of any kind during the conversation in Grosse Pointe with this witness.

[fol. 523] Mr. Kelley: Can you state as to Mr. Crandall?

Mr. Vincent: I can state that, yes.

Mr. Witt: Can I ask a further question of Mr. Kelley?

The Court: Yes.

Mr. Witt: A further question about that interview at Grosse Pointe, whether there is anything in the files of the Department of Justice, I am referring to written material, based on the chit-chat that Messrs. Vincent and Crandall had with Eckert in Grosse Pointe.

Mr. Kelley: No, the categorical answer I gave you before would cover that. I mean I am making it specifically applicable to this Grosse Pointe incident.

Mr. Witt: What is categorical, that there is nothing in the files?

Mr. Kelley: That there is nothing further than what has been produced to the Court.

Mr. Witt: In connection with this particular incident?

Mr. Kelley: Specifically applying that statement to the Grosse Pointe contact.

Mr. Witt: Then, our next question, taking them chronologically, is whether Mr. Kelley can make a statement as to any documents in possession of the Senate Internal Security Subcommittee which eventuated from the interview or interviews this man had.

The Court: I haven't heard anything that would even suggest it. He can say what he wants to. But there is no prima facie showing here that there was ever anything that would approach a statement involved in that proceeding at all. If you want to say something about it, you may.

Mr. Kelley: I think there is no foundation for it, and, as I stated at the beginning, that is a different branch of Government. The history of the Act, 3500, clearly indicates that it wasn't contemplated that anything that they might [fol. 524] have would be covered, and under the circumstances in this case where they have had the public testimony of this man on many occasions they have they claim many, many inconsistencies, it seems to me anything further, if it existed, would be cumulative.

The Court: I am not so much concerned about that, but the point I am trying to make is this: There has to be some showing made, at least some kind of a prima facie showing or something that approaches that that there is in existence something that would come within 3500. If then it develops there is, then would come the problem of ascertaining who had it and how it could be gotten. What I am asking them, what in the record indicates that there is anything in existence anywhere before any agency of the Government, any matter that would come within 3500?

Mr. Witt: I do not know how much of a record you want us to build on this, it is unfortunate we have to get into these problems under the law, but here we are, but here is the point on that, your Honor, addressing myself to your point, not to Mr. Kelley's legal argument as to the definition of agents of the Government under Section 3500: Eckert testified that he talked to Connors on at least one occasion, if I can recollect, he was not sure whether there was another investigator or not. I am familiar with Eckert's testimony before the McCarran Committee in Salt Lake City in October of 1952. As I recall Eckert's testimony in Chambers about his talk or talks with Connors, he said that

he gave him a copy of his, Eckert's statement before the CIO. Now, if you examine Eckert's testimony before Senator McCarran's subcommittee, you will find that Eckert testified about a good many other matters relating to Travis and Mine-Mill which were not contained in his statement before the CIO, and, your Honor, it is our position that this testimony of this man is incredible. Maybe he doesn't know what Connors did. It isn't possible to believe that Connors interrogated him in a public hearing, and it was Connors who did it, about not only matters contained in the CIO statement but about other matters, without Connors having some written document in his possession or in front of him during the public hearings based on his talk or talks with Eckert.

The Court: Of course, I have nothing before me but the [fol. 525] testimony of this witness, and I mean your conclusions call for an absolute disregard of that testimony and an assumption on absolutely nothing but what you might say would be the basis of your notion that no interrogator or lawyer or whatever these gentlemen's capacity is would embark on an examination without having more information. That I think is a pure whole-cloth assumption.

Secondly, even if the talk was broader than what might be suggested here by this witness conversations with Government agents or discussions with them don't come within the category of 3500. I mean there could be a dozen talks and still nothing arise. There has to be shown we all agree I think something that meets the definition of the statute with respect to statements. I see nothing in this testimony at all to indicate the existence of anything that would come within the statute. It is true I think in two or three instances the witness testified that some attorney just prior to the case being tried in which they were involved had made some notes for the attorney's own benefit presumably in examining the witness. He testified expressly and specifically with respect to each of those occasions and with respect to each of these interviews that there was no transcription of the notes made by the attorney where they were made or no reducing of them to writing and submitting them to him for his approval or anything of that sort. It seems very clear to me that in these isolated instances

in which the attorneys made notes as Mr. Kelley did here in preparation for this trial and possibly for some of these other matters do not come within the statute at all. I do not think we can determine the question Mr. Deikman has been talking about, when a statement might be considered a work product and when it might not be, because there is nothing in the form of a statement here that would come in that category. If you can point out anything in the evidence that would indicate otherwise, I would be glad to listen to you. That is my view of the thing as I see it right now.

Mr. Witt: I have two things to take up with your Honor. Number one, on your Honor's comment on what I said about Mr. Connors and the hearing in Salt Lake City before the Senator McCarran Subcommittee, just incidentally in passing, your Honor, it is very clear from the witness' testimony that Connors was not an attorney. He was an investigator for the Committee. If there is any doubt about that, I have the hearings—

The Court: That is the reason I wasn't sure. Sometimes they are attorneys. Sometimes members of the FBI are attorneys. I didn't know.

[fol. 526] Mr. Witt: In this connection as far as this particular job was concerned, Mr. Connors' job with that Subcommittee was investigator, and I have the hearings in the Courtroom, these particular hearings where the names of the Committee and the staff are listed, and Mr. Connors is listed as an investigator. If he happens to be an attorney, that is immaterial in this connection. When he was interviewing Eckert he was interviewing not as an attorney for the Committee but an investigator. But getting to the main point, if your Honor has doubt about what I said about the scope of Eckert's testimony before the McCarran Subcommittee, specifically my statement that that testimony went far beyond Eckert's statement before the CIO, then, our only alternative will be to make Eckert's testimony before the McCarran Subcommittee a part of the record in support of this motion I have here.

The Court: I do not think that would be helpful at all, because it seems to me the weakness in your position here is this: that you are asking the Court to assume from the

facts that the witness testified to something, say, beyond what was included in the CIO hearing, that, therefore, it follows that something or sometime along the line by someone, and an investigator or someone else, that he gave some statements that would come within the meaning of 3500 and I do not think any such assumption is justified at all any more than it would be any basis for assumption in an ordinary trial when a witness is interrogated. There is no assumption that I know of that at some place along the line he made a signed statement or his testimony was transcribed in advance of the trial and approved by him or someone else prepared a statement for him and came around and had him approve it ahead of the trial.

Mr. Witt: We can clear that problem up with respect to all of these agents with one suggestion I think aside from one remaining incidental problem. Let me say first that, if I have been following your Honor, I do not quite agree with your Honor's interpretation of the definition of "statement" in 3500. In addition to what your Honor has just said in summarizing that 3500 defines a statement as something which is in writing embodying what the witness said substantially verbatim, I think that is the phrase.

Mr. Kelley: It is a statement made by, is what it says.

[fol. 527] Mr. Witt: We say a statement made by the witness to an agent of the Government, passing the definition of agent for the moment, where the agent makes notes and then writes that up for his own use in connection with the trial or hearing, we say that comes within the definition of "statement".

Now, just to wind up our position on it, all this can be very easily settled again by a statement from the prosecution as to whether or not they have checked with the Senate Internal Security Subcommittee, whether they have checked with respect to this man's own testimony in Chambers about these occasions when attorneys did make notes. I wasn't here all the time, but I am informed that he said that with respect to his talk or talks with Mr. Mitchell before the first trial of Travis and he said it with respect to his talks with Mr. Broome before he testified in the SACB proceeding. We may be overlooking one, but it doesn't matter. A suggestion is we hear from the

prosecution on this. They know what the documents are if there are documents.

The Court: They would not come within the category of this statute is what I am talking about, and this amounts to the same thing as if you said to them without introducing any evidence, "we wish you to make inquiries of this agency and that agency." You made a motion for them to produce everything they had under 3500, and they have produced. Then, if you think they haven't produced; if you think there is something in existence that you are entitled to that they haven't produced, why, as I understand the law, it is up to you to show what those items are, and, if you make a showing sufficient to convince the Court that there are such items in existence, then, of course, the inquiry can be pursued further. I am positive in my own mind that this proof doesn't approach that. So, the record can show this motion denied.

Mr. Deikman: Just one more word on that. I think there was one thing left out by Mr. Witt, and that was the correspondence that the witness testified he turned over to Government attorneys.

The Court: But that would come in an entirely different category I would think. If they were used as exhibits, the exhibits are available by application to these courts in which they were filed. If it is correspondence, I think it would come under the category of subpoena duces tecum, wouldn't it?

[fol. 528] Mr. Kelley: I would think so, your Honor.

The Court: I don't think there is anything in that that would require the Government to start chasing around about correspondence. It wasn't shown they were statements. It was merely correspondence. Then, furthermore, as I say, if they were produced at the trial, Mr. Witt has been at practically every one of these trials, he knows what has been produced in the way of documentary evidence without some further identification. It is not even shown here in the custody of the Government as a matter of fact. I don't know where they are.

Mr. Deikman: Eckert said he gave exhibits, but he also said he gave correspondence. He did not remember whether it was from him to Travis or any other person. Nothing could be more clearly within the statement of 3500 than a letter on the part of the witness related to the subject matter signed by himself which he turned over to the Government. There is something in the record which supports the idea that there is such correspondence or they (sic) may be such correspondence.

Mr. Kelley: I think he stated he turned over correspondence between Mine-Mill and himself and possibly the Die Casting Division of Mine-Mill, between Travis and Mine-Mill or Travis and Eckert, all of which would be available, the copies or the originals would be with the defendant or Mine-Mill.

Mr. Witt: That is too ridiculous for words. We are shooting in the dark. This man says he turned over all kinds of correspondence over a period of years, all kinds of minutes and convention proceedings and all the rest of it, and instead of the prosecution making a frank statement of what they have or disclosing it to the Court, that is all we are asking, so the Court can see whether they come within Section 3500, we are told without knowing just what this man turned over except vague freightloads of material that it is all in our possession.

The Court: That is just the trouble with the thing, is the vagueness of the showing. Does the Government know of any correspondence or anything?

Mr. Kelley: Well, on that, your Honor, I cannot speak. I know nothing about any letters or anything like that.

[fol. 529] The Court: I doubt if it would come within this category at all in the absence of some other showing.

Mr. Kelley: There is no indication that these letters contained any statements.

The Court: I don't think it would come in this category at all, but I don't know, unless there is some showing about what it was or something of that sort.

Mr. Witt: We have had our say, if the Court please.

The Court: We had better proceed.

Mr. Witt: There is this one point about the Grand Jury issue that I referred to this morning, your Honor, that we have to clear up before we go into open court. We didn't make that too clear this morning. We didn't have enough time. We have already made a record in support of this issue which we will argue at the appropriate time which I take it is after Eckert has finished with his cross examination, and it is in support of this motion for production of the Grand Jury testimony, but the one remaining problem, your Honor, is this: There are some incidental aspects of his testimony which we think could appropriately be brought out before the Jury, but they are incidental, and I think they are burdensome before the Jury, and we don't care to make our point with respect to those problems before the Jury even though we think they would help us. Because of the time and effort consumed before the Jury we do not think it would be worth it But we think they are points which we are entitled to bring out before your Honor before your Honor rules on our Grand Jury motion. So, we will do it either way if your Honor and the prosecution wants us to indicate.

The Court: I thought yesterday you said that this question relates to the Grand Jury which you intended to develop in here.

Mr. Witt: Yes.

The Court: That is what I think.

Mr. Kelley: Have you made your motion for the production?

[fol. 530] The Court: He did once.

Mr. Witt: We will renew it. I am making that to save my record.

The Court: Do you wish to make any other showing in here about you. Grand Jury business?

Mr. Witt: Yes, in open court. I can tell you what the points are if it will help Mr. Kelley to feel better. We will do it either way, but we insist we have to do it some way.

The Court: What do you think you can show?

Mr. Witt: There are additional items of testimony we think we can develop from this witness with respect to the four following people about whom I have already interrogated him to some degree: James Durkin, Jack Marcotti, Hugh Bryson, and Harold Sanderson.

The Court: You mean that he placed them in a meeting at some time and at another time didn't place them there, is that what you mean?

Mr. Witt: Yes, but the point is with respect to these four people we want to try to show why it is that at particular times he didn't place them in particular meetings and at other particular times he did.

The Court: Is that evidence or argument?

Mr. Witt: That is evidence through this witness. It won't take long I think.

The Court: We had better get him. But we had better go ahead and have the next installment of this.

Mr. Witt: That is what we prefer.

Mr. Kelley: We would like to conclude with this witness. The thing is there should be an order that we have to produce it, then they would want time to examine it or you would have to take time to examine it, and, if you found anything like that—

[fol. 531] Mr. Witt: We want to conclude in court on the Horowitz meeting.

The Court: They want to cross-examine further, but that has nothing to do with this.

Mr. Witt: We suggest we come back in Chambers on the Grand Jury motion.

The Court: When you get through with this witness, just asking you this informatively, is there any reason why you can't go ahead and then call your next witness and then we will recess, say, about 4:00 o'clock and then settle this thing, will that be all right?

Mr. Kelley: Well, the only thing I want to do, your Honor, this witness has been here since January 10 and it is an expense to the Government.

The Court: That will get it disposed of today. What I hate to do now is take another hour and have the Jury waiting here. I would rather recess at 4:00 o'clock. This examination will be rather brief I understand.

Mr. Witt: I think we can be done within ten minutes at the most if the prosecution won't harry us with objections. On these four people, if the prosecution will be good enough to cooperate, I do not think it will take longer than 15 minutes.

The Court: Let's figure it this way: We will recess at 4:00 o'clock, and then we can come in and cover this Grand Jury business in here.

Mr. Witt: With Eckert.

The Court: All right.

In Open Court

The Court: I understand that you wish to proceed further with your cross examination.

Mr. Witt: Yes, sir, on just one subject, if the Court [fol. 532] please, as I explained to the Court and the prosecution in Chambers.

KENNETH ECKERT, resumed the stand, and testified as follows:

Cross examination.

By Mr. Witt (Continued):

(Document marked Defendant's Exhibit G for identification.)

Q. Mr. Eckert, before we went to lunch I asked you some questions about when it was and how it was that you went to the St. Paul convention, and, if I remember one of your answers, you said you didn't recall whether you went there by plane, is that right?

A. That's right.

Q. Mr. Eckert, I show you Defendant's Exhibit G for identification and ask you whether you recognize what that is.

A. Yes, I think I do.

Q. Will you tell the ladies and gentlemen of the jury what that is.

A. It appears to be an expense account form of the Mine, Mill & Smelter Workers of the type used at that period.

Q. Is that particular one your own voucher for the last half of August of 1947 signed by you?

A. It appears to be.

Q. Do you see anything anywhere on that voucher which indicates that it has been doctored in any way?

A. Well, I don't know what the erasures mean there.

Mr. Witt: Will you read that answer?

(The reporter read the last answer.)

Q. All right, will you indicate to me what erasures you are referring to?

A. Well, here is one here.

Mr. Witt: Mr. Kelley, do you want to observe this? I am sorry, we will try to make it clear to the Jury.

A. One here and here, both places.

Mr. Witt: May it be stipulated, I think we can do it more quickly that way with Mr. Kelley's agreement, may it be stipulated when the witness was referring to erasures he was pointing to a section on the bottom which is apparently the front of this form where the witness's signature appears where there is a recapitulation of his expenses for that period?

[fol. 533] Mr. Kelley: That is correct.

Q. Now, Mr. Eckert, I direct your attention particularly to the date of the 18th, and that would be the 18th of August, 1947, as the witness has testified this is for the second half of August, '47, I direct your attention particularly to the 18th and ask you whether that doesn't show that on the 18th of August, 1947, you traveled from Cleveland to Chicago by plane.

A. Yes, I think it indicates that.

Q. All right, then, I will ask you to tell the Jury whether your own entry there on the 19th, the next day, doesn't show that you traveled from Chicago to St. Paul by plane.

A. The entry shows I traveled from Chicago to St. Paul on that day by plane I believe.

Q. All right, that was on the 19th of August, is that right, Mr. Eckert.

A. Yes, I think that is what it said there.

Q. And I think you testified this morning that you attended the Board meeting in St. Paul which began on the 20th of August, is that right?

A. To the best of my recollection, yes.

Q. Do you want to look at that exhibit again, the exhibit of the Board minutes, Defendant's Exhibit F for identification?

A. Well, this document shows me present at the Board meeting, yes.

Q. Beginning on the 20th of August?

A. Yes.

Q. Now then, Mr. Eckert, I will ask you whether you can now fix more exactly the date of the Horowitz meeting, or perhaps to make my question more precise so that we won't misunderstand each other, I will now ask you to tell us whether the Horowitz meeting about which you testified in this trial in Chicago took place on August 18 or August 19.

A. I don't know.

Q. And this does not serve to refresh your recollection, this voucher of yours dated August 31, does it?

A. My recollection is that the meeting took place shortly before leaving for St. Paul.

Q. Well, I will ask you now when you say shortly before leaving for St. Paul you mean on August 19?

A. No, I don't recall what date it was.

Q. You mean August 18?

A. I don't recall.

Q. You are not willing to—

The Court: I think you had better change that "willing" to "able".

[fol. 534] Mr. Witt: Yes. I was having difficulty finding other words in the English language. You want to put the question, your Honor?

The Court: No, only I do not like your "willing".

Mr. Witt: I would be pleased if you would.

The Court: I was going to suggest "able".

Mr. Witt: Thank you very much. I think that is very helpful.

Q. Mr. Eckert, are you able now to tell the Jury whether the Horowitz meeting took place on August 18, 19 or whether it took place on an earlier date?

Mr. Vincent: If your Honor please, it has been asked and answered at least three times.

The Court: No, I think he can answer the question.

A. I am unable to recollect the day that it took place.

Q. But it would still be your testimony that, as I understood it on direct examination and under my cross examination this morning, that that Horowitz meeting took place a few days before the convention?

A. Well, it was either a few days before the convention or before this Board meeting. The Board meeting and convention run together, and they meet, the Board meets before the convention and sometimes during the convention. I am referring to a few days before the annual convention and meeting in St. Paul.

Q. If I followed you, and, of course, you will correct me if I do you an injustice, you now have testified a little bit differently than you did when you first testified about this on direct, and let me refer to your testimony on this precise question as to just when the Horowitz meeting took place, when you testified on direct last week, page 150: "Question: When or how long prior to the St. Paul convention did this meeting occur? Answer: Well, it was just prior to the convention, I believe, not more than a few days before the convention opened." Do I understand you to be saying now that you want to change that to a few days before either the [fol. 535] convention opened on the 25th of August or a few days before the Board meeting began on the 20th of August?

A. Well, not unless you want to separate the convention and the Board meeting.

Q. All right, Mr. Eckert, I will ask you to look at Defendant's Exhibit G for identification again and ask you whether it is not true that that shows that on August 16 and 17 you were in Cleveland which, of course, is all 1947. I won't keep repeating that.

A. Yes, that's correct.

(Document marked Defendant's Exhibit H for identification.)

Q. Mr. Eckert, I now show you Defendant's Exhibit H for identification and ask you to look at this and ask you to tell us whether that is not the voucher you submitted to the International Office of Mine-Mill for the period ending August 15, 1947.

A. It purports to be a copy of it.

Q. A copy of your voucher?

A. This is a carbon copy, a carbon copy of something.

Q. Yes. Well, I will ask you to look at that signature. Is that your signature at the bottom of that?

A. Well, it is a carbon copy of what appears to be my signature.

Q. All right. Using that carbon copy of what appears to be a voucher for that period and a carbon copy of what appears to be your signature I will ask you to look at that carbon copy and examine where you were during that period and tell us whether that carbon copy shows at any time during the first half of August, 1947, you were in Chicago, Illinois.

A. Well, this document does not show me as being there, no.

Q. Now, finally, Mr. Eckert, I will ask you again whether it would be your present testimony that you attended the Horowitz meeting in Chicago on August 18 or August 19, 1947.

A. No, possibly that deduction could be made from those documents, but my recollection is still what it was before. I am not able to recall the exact days the meetings were held.

Mr. Witt: That completes the cross examination subject to our discussion in Chambers with respect to interrogating this man further on the issue relating to Grand Jury testimony.

The Court: All right.

[fol. 536] Mr. Kelley: The Government has no redirect, your Honor.

The Court: You may step down, Mr. Eckert. You will remain in attendance until you are formally excused, and you can call your next witness.

(Discussion at the Bench.)

In Open Court

The Court: Ladies and gentlemen of the Jury, as you have just observed, they have completed the cross examination of the witness on the stand, and the Government had no redirect subject to one reservation, one matter that is still under consideration that might involve further cross examination. But the normal step would be next for the Government to proceed with their next witness. Counsel just advised me that due to a variety of circumstances that it would break up the continuity of the testimony to attempt to proceed here this afternooon with the Government's testimony.

I might say that we previously had agreed that we would recess at 4:00 o'clock today, and on that basis the Government advises it would break up the continuity of their testimony to call a witness now for an hour or so and then start on another witness tomorrow and then have to continue with the examination of this first witness for some future time. So, I think we will just recess now until tomorrow morning at counsel's suggestion.

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In Chambers

The Court: You may proceed.

Mr. Witt: All right, your Honor. In answer to the question you asked a few minutes ago, as I think I have indicated, we want to interrogate the witness further about four people whom he mentioned in his testimony, so, my proposal is that I go ahead with that and take each of them in order.

The Court: You may proceed.

Mr. Witt: May I make a statement as to this so we do not [fol. 537] spend time getting the continuity back from the witness in terms of his testimony in open court? First, with respect to James Durkin I think the record will show that

yesterday I asked him about his testimony in the different proceedings over the years about James Durkin's presence at this meeting in New York early in '48 attended by Communist Party leaders and trade union leaders, and the record yesterday will show that the witness Eckert mentioned the name of James Durkin as one of those in attendance for the first time when the witness Eckert testified in 1957 before the SACB.

Mr. Vincent: Excuse me, did you say the record would show that you had interrogated the witness over a period of years in regard to James Durkin?

Mr. Witt: No, I don't think I intended to say that. Did I say that?

Mr. Vincent: That is the way I understood it.

Mr. Witt: Without wasting time going over the record I certainly didn't intend to say that. I never interrogated him.

The Court: He implied he interrogated the witness for a number of years when he was on the stand.

Mr. Witt: Maybe I garbled it. If I did not make myself clear to Mr. Vincent—

Mr. Kelley: Before you start over let me make an objection to going into anything in regard to James Durkin for the reason that his name was not mentioned on the direct examination of the witness, as I recall, and the only thing that could be accomplished would be an attempt to impeach his testimony in other proceedings and his testimony on cross examination in this proceeding.

Mr. Witt: No, sir. Mr. Kelley also then didn't understand me.

The Court: I am wondering what the province of this discussion is. Whatever the record shows it shows.

[fol. 538] Mr. Witt: Suppose we go ahead.

The Court: Yes, proceed.

KENNETH ECKERT, a witness called by the Government, having been formerly sworn, testified as follows:

Examination.

By Mr. Witt:

Q. Mr. Eckert, did you say in your testimony before the SACB in 1957 that James Durkin attended the meeting in New York early in 1948?

Mr. Kelley: Now, we object, your Honor.

The Court: This brings in the Government's objection. If this man's name, Durkin, is it?

Mr. Witt: James Durkin.

The Court: —is not mentioned in this trial, how are we concerned with the testimony here? Was it mentioned in this trial here?

Mr. Witt: No, it wasn't. Even so I think we are entitled to bring it out in order to make a record on the motion for Grand Jury testimony, and let me state why we think so if you will.

The Court: On what theory?

Mr. Witt: We want to show aside from showing inconsistencies and contradictions in this man's testimony which we have already shown in open court, which we will try to summarize in connection with this Grand Jury point that we are considering, an additional reason why we are entitled to his Grand Jury testimony. When I say we are entitled to it, of course, I mean in the context I have already stated, either produced to yourself first or produced directly to us, because his testimony on this Durkin question aside from other questions which we will come to later will show that this man contrives his testimony from occasion to occasion depending upon the circumstances, depending upon what he thinks the Government wants from him, and I am not suggesting that the Government necessarily tells him, and in terms of what he thinks will do the greatest injury to Travis, Mine-Mill or the people affiliated [fol. 539] or associated with Mine-Mill. As far as this Durkin thing is concerned—

The Court: To save a lot of time I think I will overrule the objection, and you can go ahead with the testimony. You can answer that question. Do you remember what it was?

Mr. Witt: I will ask it again, and I think we will save time.

Q. The question was, Mr. Eckert, whether in your testimony before the SACB you testified that James Durkin attended the meeting in New York early in '48 of Communist Party leaders and trade union leaders.

A. I recall your having shown me the transcript which I read yesterday and stated that apparently was my testimony. I don't recall what the testimony was.

Q. Do you recall with respect to the testimony I showed you yesterday before the SACB that before 1957 when you testified before SACB that in other proceedings that on those other occasions when you testified about that meeting in New York in 1948 you did not testify that Durkin was present, do you remember that yesterday?

A. What other occasions?

Q. You testified about the meeting in New York in 1948 on other occasions.

The Court: What he means is when, what other occasions.

Mr. Witt: Other occasions when he testified. We went through it yesterday. I want to save time.

Mr. Kelley: As long as we have been through it why do we go through it again?

Mr. Witt: I am making the record on the other point.

The Court: If it is in the record already, there is no use of going over it again. I understood what you are going to do is that we are considering all the testimony that was given in the courtroom and you can refer to that in your argument and that this was something in addition to what has been developed in the courtroom.

Mr. Witt: All right.

Q. All right, Mr. Eckert, you testified in the hearing in [fol. 540] Chambers today, perhaps also yesterday and also in open court that you testified before the Grand Jury

in this District Court in 1956. I will ask you whether in your appearance before the Grand Jury on that occasion, that is, the second occasion on which you testified before a Grand Jury in this Court, on that occasion you gave testimony about James Durkin.

Mr. Kelley: The Government objects to that for two reasons: First, there is no foundation for asking it. He is inquiring into a matter that relates to an indictment that was returned and which is pending in this Court on a case in which Mr. Witt is also counsel, and it is in the nature of a fishing expedition.

The Court: I think I will sustain the objection.

Mr. Witt: All right, sir. I don't want to argue these points. I want to make my record. Okay, I will go to my next question.

Q. Mr. Eckert, before you testified in Washington before the SACB in 1957 did you learn or had you been told that James Durkin had been indicted in this Court in November of 1956?

Mr. Vincent: The Government objects to that question, your Honor.

The Court: What is the purpose?

Mr. Witt: The purpose of this is to show—

The Court: I think I will overrule the objection and he can answer if he knew, and we will see what that brings. Can you answer that?

A. I don't know whether I did or not.

Q. Mr. Eckert, were you told or did you hear that there was an indictment against 14 people handed down by a grand jury in this court in November, 1856, (sic) those 14 people either being presently connected with Mine-Mill or having been connected with Mine-Mill in the past?

Mr. Kelley: The Government objects to that.

The Court: I will sustain the objection to that. I can't [fol. 541] see the purpose. Ask him a specific name if there is any significance, but what is the point about whether he knew the fact there was an indictment in this court against 14 people without knowing anything more about it?

Mr. Witt: This is preliminary, your Honor.

Mr. Kelley: Let's try the case. Let's not lay the foundation for your next lawsuit. Let's get this out of the way.

Mr. Witt: The Government wants to try one case one way with one set of testimony and another case another way with another set of testimony. We do not think this is the principle of our system of justice.

The Court: You can ask him about specific people. He already answered about Mr. Durkin.

Mr. Witt: I will go on to the next question. I take it your Honor sustained the objection.

The Court: I do on the basis of the form of the question.

Q. Mr. Eckert, did you in any connection, not only in connection with the meeting in New York early in 1948, ever mention the name of James Durkin when you testified in an open court, in an open hearing before your appearance in Washington in 1957 in the SACB hearing?

A. I don't recall whether I did or not.

Q. Mr. Eckert, did you name James Durkin in your testimony before the SACB as a member of the Communist Party to your knowledge and as a person who attended that meeting in New York in early 1948 in order to prejudice Mr. Durkin because you had heard about or been told about the indictment in this court against 14 people including Durkin in November of 1956?

Mr. Kelley: The Government objects to that.

The Court: I think I will let him answer that.

Mr. Kelley: Your Honor, it is strictly an argumentative question. Did you get the full import of the question?

[fol. 542] The Court: I think I did. I think he simply asked him if he mentioned his name there because he heard of this indictment here and mentioned it with the idea of prejudicing Mr. Durkin, that is what the question was.

Mr. Kelley: That would not have any bearing on whether they were entitled to the grand jury minutes.

The Court: He seems to think he has some law that might be a factor. I think you can answer, Mr. Eckert.

A. After I left the Mine, Mill and Smelter Workers I attempted to adopt a code of decency and abandon the tac-

ties of the Communist Party that I learned from my associates in the Party and in Mine-Mill.

Q. There is no jury here, Mr. Eckert, so, you are not getting anywheres with that. Now that you made that little speech will you answer the question?

Mr. Kelley: That is a fair answer to the question.

The Court: I think you can answer whether you did it with the idea of prejudicing him was what the question was.

A. Well, I certainly did not.

Q. Mr. Eckert, the record of your testimony in this trial shows that when you testified about the meeting at Henry Horowitz's which did or did not take place in Chicago in August, 1947, when you testified about that in the Jencks case and you named those present you didn't name Jack Marcotti, when you testified about that meeting on the first trial against Travis in this court and you named the people present you did not name Jack Marcotti, but that when you testified in 1957 before the SACB about that meeting at Henry Horowitz's, which did or did not take place in August, 1947, and when you named the people present you named Jack Marcotti as one of those present. Therefore, Mr. Eckert in your capacity now as a teller of the truth I will ask you whether the same question about Jack Marcotti that I asked you about James Durkin, did you finger Jack Marcotti for the first time in 1957 because you knew or had heard that he was one of the 14 indicted in this court in November, 1956?

Mr. Kelley: The Government objects to counsel badgering this witness. It is wholly uncalled for and improper type of proceeding even in Chambers.

[fol. 543] The Court: Well, I think you can answer the question.

Mr. Crandall: Your Honor, may I interpose here? He has brought out the fact that the Horowitz meeting did or did not take place. Actually, I think the record is clear that it did take place, so, I think the question should be rephrased.

The Court: I am assuming that the factual recital is correct. If the witness doesn't agree with that, he doesn't

need to answer the question, but on the basis of the factual statement being correct the ultimate question is the same as this other one, whether he included Marcotti's name at this time to prejudice him and whether that action resulted from the fact the indictment had been returned here in this other case. That is about what the question is.

Mr. Witt: I didn't ask him about prejudice this time. I will rephrase it leaving out what Mr. Crandall objected to.

Mr. Kelley: This doesn't show any foundation laid.

The Court: They say they have some authority. You can restate your question.

Q. Mr. Eckert, since in connection with the Horowitz meeting you did not name Marcotti in the Jencks case when you testified in 1954 or in the first trial against Travis when you testified in 1955, and, however, you named him in 1957 when you testified before the SACB, I will ask you whether you named Jack Marcotti in connection with that meeting as one of those being present for the first time in open proceedings because you knew or had heard that Jack Marcotti was one of those that had been indicted in this court in November, 1956.

Mr. Crandall: I object to that.

Mr. Vincent: I object to that, your Honor.

Mr. Crandall: He is assuming that this is the first time that he has mentioned Jack Marcotti in any proceedings. I don't think there is a foundation for it.

Mr. Witt: In connection with the Horowitz meeting.

[fol. 544] Mr. Vincent: We don't know if the witness has a recollection of what he testified.

Mr. Crandall: You are assuming that is the first time in any proceeding.

Mr. Witt: In open proceedings.

The Court: I think you should rephrase the question and base it on what is in the record here.

Mr. Witt: I will re-ask the question.

Q. Without reference to his testimony in the Jencks case, in the first Travis trial, and the SACB. Do you understand it now, Mr. Eckert?

The Court: What is the question?

A. I am afraid I don't.

Q. Mr. Eckert, I will ask you, since the record in this case shows that you did not name Marcotti as one of those present in the Horowitz meeting when you testified in the Jencks case and you did not name him as one of those present at the Horowitz meeting when you testified about that in the first trial against Travis but that you finally did name him when you testified about the Horowitz meeting before the SACB in 1957, whether you named Marcotti as one of those present at the Horowitz meeting when you testified in 1957 because you knew or had heard that Jack Marcotti was one of the 14 indicted in this Court in 1956.

A. I didn't name Marcotti in any proceeding for the purpose of prejudicing Marcotti for any purpose.

Q. I didn't ask you about prejudice. I simply asked you, had you named him—

The Court: I think the answer is responsive.

Q. In connection with Marcotti do you have any explanation of why when you testified about the Horowitz meeting on your direct examination in this trial and named the people who were present you did not name Marcotti, you wanted to help him by omitting his name this time?

[fol. 545] Mr. Kelley: I think it has been asked and answered.

The Court: I do not know whether it has.

Mr. Witt: No, it hasn't.

The Court: I think he did answer it. I think he did answer it out here.

Mr. Witt: Not about Marcotti.

Mr. Kelley: It is the same.

Q. Is there any explanation as to why you didn't mention Marcotti this time as being present at the Horowitz meeting?

A. I didn't name Marcotti because his name didn't happen to occur to me at that time.

Q. Mr. Eckert, the record of the proceedings in this trial shows that in connection with at least one meeting

you named Harold Sanderson as being present when you had not named in connection—

The Court: I think that is all in the record, isn't it?

Mr. Witt: Perhaps your Honor is right. I am sorry I overlooked that.

The Court: I think that's right.

Mr. Witt: I think we went into that. I will withdraw the question I started to ask.

Q. Mr. Eckert, I asked you questions on cross examination yesterday afternoon about Hugh Bryson in connection as to whether or not you did or did not name him on different occasions as being present at the meeting in New York early in 1948. Do you recall that I examined you on that subject before the SACB?

A. I have some vague recollection. I am not sure whether you did or not.

Mr. Witt: Your Honor, I think we can save time probably if instead of asking him the same questions I asked him before the SACB we can just read these couple pages about Bryson which contain the point I want to bring out which wasn't brought out in open court which I think [fol. 546] is relevant on our motion in connection with grand jury testimony. Does your Honor want to look at the testimony first?

Mr. Kelley: This is not inconsistent with his testimony in this trial, is it?

Mr. Witt: I brought out the inconsistency in open court. This is from a different point of view. This is as to his motivation for naming Bryson as being present at that meeting.

The Court: The facts about Bryson were developed in the trial.

Mr. Witt: Yes, but this is different.

The Court: He has already testified whether he did or didn't mention it.

Mr. Witt: I am not going to go into that again. I don't want to repeat that. This testimony before the SACB I did not go into it in open court and it goes to the question as to his motivation for mentioning Bryson as being

present at that 1948 meeting in New York for the first time in the Gold case.

The Court: What is your question? Let's hear your question.

Mr. Witt: My proposal was instead of wasting time asking questions I can read these questions and answers from the SACB proceeding. Is that all right, Mr. Kelley?

Mr. Kelley: It is all right with me. I have a continuing objection to this whole line.

Mr. Witt: You can object at any point here. I am willing to let you, and his Honor will rule. You don't have that, your Honor. This is the SACB.

The Court: I thought you interrogated him about that yesterday. That is what I was trying to find out.

Mr. Witt: The question that precipitated him naming him for the first time in the Gold case, can I go ahead?

[fol. 547] The Court: Go ahead, yes.

Mr. Witt: "Question: I am not asking you that, but I will ask you whether in your testimony here you mentioned the name of Bryson, B-r-y-s-o-n. Answer: Hugh Bryson. Question: Yes. I am referring to Hugh Bryson. My question now is whether you mentioned Hugh Bryson's name in your testimony here in this room when you listed the names of the people who attended that meeting. Answer: I don't recall having mentioned his name. Question: You gave that testimony here this week and you say you don't recall whether you mentioned his name in your direct testimony about that meeting? Answer: I said I don't recall mentioning Hugh Bryson's name."

I think I can save time.

The Court: That is in the record yesterday.

Mr. Witt: But it will take more time to explain the continuity. If you will give me a few minutes to look at it, I think I can cut out some of the colloquy. All right, I am skipping some of the colloquy, questions and answers, rather, on page 1180, if the Court please and Mr. Kelley, and then at the bottom of page 1180: "Question: I will ask you, Mr. Eckert, whether you ever heard that Bryson was under indictment. Answer: I don't recall having read his name. Question: You haven't heard in recent years that Bryson was under indictment? Answer: I thought you

were referring to the Denver—" And the witness didn't finish the answer. "Question: No, you listen to my question. I wasn't referring to Denver at all. I am just asking you whether you recalled that Hugh Bryson has been indicted. Answer: I am listening, Mr. Witt. If you will be coherent I will understand you."

And then there is colloquy with the Bench on that. Then we can go down the page again. This is now page 1181. "Question: The question is whether you have heard in recent years that Hugh Bryson was indicted. Answer: Well, I can answer it this way, Mr. Witt: I have not heard of whether he was indicted, but the FBI did ask me if I would testify on one occasion. Question: And when was that? Answer: Well, to the best of my recollection that was two or three years ago. Question: And was that at or about the time you testified in the Gold case? Answer: Well, it could be. My recollection is not too exact [fol. 548] concerning it. Question: You remember your testimony or our stipulation that you testified in the Gold case in 1954. So that when you say the FBI talked to you about Bryson two or three years ago, then would that mean at about the time you testified in the Gold case? Answer: The best answer I can give is at one time they queried me whether I would be able to testify. To the best of my recollection it was two or three years ago. That is about as close as I could put it. Question: At the time you testified in the Gold case—"

The Court: What are we doing here?

Mr. Witt: I am finished with this last question and answer, and then we can discuss what we are doing. We can make our record, your Honor.

The Court: All right.

Mr. Witt: "At the time you testified in the Gold case, and when you talked to the FBI and to the prosecutors in Gold, did the FBI and prosecutors tell you at that time that Hugh Bryson was under indictment? Answer: Not that I can recall." Now, that is what we want in, your Honor, and any time you are ready we will tell you what we are doing.

The Court: What is the question directed to this witness?

Mr. Witt: Well, the question is whether he recalls giving those answers to those questions before the SACB.

Mr. Kelley: Does that relate to his motivation?

The Court: What is the relevance?

Mr. Kelley: That is what you started out—

Mr. Witt: That is something else. Let's take one thing at a time. Your Honor proposes one thing, and the prosecution says something else. I get confused and tired.

Mr. Kelley: You started out to show that this contradicted his statement on motivation.

[fol. 549] Mr. Witt: I did not say that.

Mr. Kelley: You have got me confused.

Mr. Witt: I am sure I have. I will try to unconfuse you, Mr. Kelley, and state it as simply as I can. We want this evidence in this record on the grand jury issue not to show inconsistency about his naming or not naming Hugh Bryson. We have done what we thought we could do with that already in open court. We are producing this evidence in order to show that whether this man Eckert does or does not name a person at a particular time when he, Eckert, is under oath depends upon the circumstances of the particular time and particularly whether he can do the particular person the most damage and give the Government the most help at that particular time.

Mr. Vincent: Could we have Mr. Witt's legal reasons for his argument?

The Court: I am even narrowing that. This thing was gone into in the case in the courtroom yesterday. Here is Mr. Witt's question: "Question: All right, Mr. Eckert, in view of that answer I will ask you why it is that when you testified against Gold in 1954 you mentioned the name of Hugh Bryson, that when you testified against Travis the first time in 1955 you did not mention the name of Hugh Bryson, and why it is that when you testified about this meeting and who was present before the SACB in 1957 you did not mention the name of Hugh Bryson, and then when you testified about that meeting on direct examination last week here in connection with that meeting you said that Bryson was one of those present, will you explain why in view of your psychological explanation as to whom you know well and as to whom you don't know

well why you mentioned Bryson the first time in all of this testimony in the Gold case and then did not name him on the two subsequent occasions in the first Travis trial and before the SACB and then named him again on the second trial of Travis? Answer: Yes, sir. Question: All right. Answer: I think that the only thing I could add again is that for the reasons already stated at the particular time these questions are asked me my recollection is seldom—I am seldom asked to name all of them, but I name those that I can recall at the time. The name of Mr. Bryson which has been mentioned here in this last question, he falls in that category. I mentioned h name when that name occurred to me in the difficulty, great difficulty of recalling these events that occurred so many years ago." [fol. 550] Mr. Witt: Well, your Honor, just one word. I don't want to take much more time on this. As I have tried to explain, apparently I didn't make myself clear, following that examination that your Honor just referred to I decided not to ask the witness about whether the FBI had talked to him about Bryson as I did before the SACB for the reason I tried to make clear in Chambers today, I didn't want to burden the jury. In addition I saw no reason for prejudicing Hugh Bryson on this record in public, and I thought that was one of the points I would reserve for Chambers to complete our record in support of our motion.

The Court: What is it you want to ask now?

Mr. Witt: I have done it. The question is pending. I have read him his testimony on Hugh Bryson and whether the FBI talked to him about Hugh Bryson at about the time he, Eckert, testified in Gold. Now I am asking him whether having heard that testimony of his before the SACB he remembers he gave those answers to my questions, that is all then, we are done.

The Court: I guess there is no argument about the transcript, is there? I don't see the relevancy.

Mr. Vincent: It hasn't any relevancy in the proceeding.

The Court: You can answer it whatever way you wish.

Mr. Kelley: Is there a question pending?

The Court: He just propounded the question.

Mr. Kelley: I thought it was just testimony by Mr. Witt.

Mr. Witt: Mr. Kelley, that is not proper. I read from the SACB. Please—

Mr. Kelley: Your last statement.

The Court: The witness indicates he heard the question.

A. That appears to be the testimony I gave there in so far as I can recall.

[fol. 551] The Court: Is there anything further?

Mr. Witt: We pass the witness for the Court's determination or whatever you call it.

Mr. Kelley: Are you all through on this thing now?

Mr. Witt: We are all through making our evidentiary record in support of our motion on grand jury testimony.

Mr. Kelley: We have no questions in regard to this matter. Does the Court have any?

The Court: No, I haven't any.

Mr. Kelley: May it please the Court, we ask that the witness be excused subject only to being recalled.

The Court: What he had better do is stay around here until this question is decided, and then you can tell him.

Mr. Kelley: If we have to produce anything which they use on further cross examination. I suppose that is the object.

Mr. Witt: It certainly is.

The Court: You can wait. You are excused now. We will have a 15-minute recess.

ARGUMENTS ON MOTION FOR PRODUCTION OF GRAND JURY RECORDS AND RULING THEREON

The Court: You may proceed.

Mr. Witt: All right, your Honor, we want to try to make our point as concise as possible and not burden your Honor with lengthy argument, and your Honor may have questions. We think under the cases that our position for the production of this witness's Grand Jury testimony on the several occasions either to the defense directly or at least to your Honor first is justified on this record for the following reasons: One, we think we have successfully shown in our examination of this man in open court, our cross examination of him that there is probably not a

single occasion over the years on which he has testified in open court or in open proceedings of which we have a [fol. 552] transcript, there is probably not a single incident in which he has, about which he has testified in this trial on direct examination about which he has been consistent on two or more occasions when he has testified publicly. We think that goes for every so-called Communist Party meeting he testified to here on direct examination.

We have shown that when he testified on every one of those in other proceedings he has never been consistent either with his testimony on direct here, his testimony in the first trial or his testimony elsewhere. That is our first major argument.

Our second, your Honor, is this witness's palpable obvious extensive effort to avoid giving honest testimony which he does remember by saying continually on cross examination whenever a vital issue is approached, and in the course of his examination in Chambers on the other issues, of saying continuously that he doesn't remember even if the question deals with a matter which any normal person with normal intelligence would obviously remember, and I am not going to go over the details, because I said we do not want to make this argument too extensive, but just one illustration of that that happened in open court in order to emphasize our point: In open court yesterday afternoon I asked him about his talks, if he had any, with the FBI about Chase Powers, and he didn't remember, and then we showed that we had in our possession as a result of your Honor's order a document which showed that he had talked to the FBI about Chase Powers in January, 1956.

Here is a man who purports to remember conversations, at least the substance of them, which took place 16 years ago, 1942, and doesn't remember that he talked to the FBI about Chase Powers in Detroit I think it was in January, 1956. I stop on that one particularly, your Honor, because you will recall that the last paragraph of that document expresses the witness's feelings about testifying, and obviously an important matter. Of course, the record shows that despite that statement he made to the FBI in Jan-

uary, 1956, he has subsequently testified before the SACB on this trial, but in any event I am referring to that last paragraph to emphasize the point that an honest witness could scarcely have forgotten that occasion when he talked to the FBI about Chase Powers. I won't go on to the dozens and dozens and scores and scores of other similar situations that we could cull from this record without any difficulty.

[fol. 553] In the third place, there can't be the slightest question, there might be a question in the minds of the jurors, because they haven't heard it all, but I do not think there should be with all due respect the slightest question in your Honor's mind about this man's pathological hatred and prejudice against Mine-Mill, against the defendant, and against Communists. I refer to the fact that there might be some doubt about that demonstration in open court, because his attitude in Chambers merely gilded the lily for us as illustrated by his little speech this afternoon attacking Communists. Now, we are not saying that this man cannot hate Communists. He can hate them all he likes. What we are saying is that his hatred is so great and we think so pathological as to disqualify him as a witness against a man who he has been saying was a member of the Communist Party. So that we say this man is psychologically disabled from giving honest and truthful testimony against anybody who in his opinion is a Communist or was a Communist and hasn't pursued the course of life that he, himself, has pursued since 1948. That is the third point. Again, I won't try to document that except one or two individual illustrations.

In open court when I asked him who John Williamson was aside from the fact he horsed around in his usual effort to divert my cross examination he said that Williamson was a dope, Williamson being the man he described as the National Trade Union Secretary of the Communist Party. An illustration along the same lines and for the same reasons to divert me and expressing his hatred and contempt for the defendant was his statement that he had told Mr. DeCook that Travis was getting fat. Along the same lines is his nonsense in open court, again, not only expressing his pathological feeling but in this connection

even more attempting to divert my cross examination and make it more difficult, his references to the "doctoring" of the copy of the minutes of the February, 1946, Board meeting, when the record shows, and there can't be any doubt about it, the prosecution cannot dispute it, that this man has been identifying those documents since 1950 to our knowledge and according to his own testimony has been giving copies of those same documents including that particular one to Government agents right along.

Now, our next major point although it is really a subdivision of this last one is that the record shows that this man is ready to cooperate with the prosecution whenever [fol. 554] he knows what the prosecution wants or whenever he thinks he knows what they want as illustrated, as we tried to illustrate in the cases of Durkin, Marcotti, Sanderson, and Bryson. Along the same lines in an effort to build himself up and to help the prosecution with juries is his inconsistent testimony about the year when he joined the Communist Party, and, if I were to pick out, your Honor, any items of testimony which were the touchstone to the kind of character this is and what he is doing on the witness stand in these proceedings I would pick that out for this reason, your Honor, that will indicate to you why I use strong language about him: You will recall, your Honor, that in the statement he made to the FBI, I believe this is the one in his own handwriting, the only one in his own handwriting of which we have a copy, in 1951 he told the FBI that he had joined the Communist Party in the early part of 1932. Now, I emphasize the words "early part", your Honor, because that means that the man in this statement to the FBI was being exact. He didn't give the kind of answer he gives on the witness stand all the time—"It was around that period," "a few days before", "I am not sure", "it was this year" or "that year." He didn't say that in this report the way he said it on the witness stand about the organization of the Steering Committee, either late '45 or early '46. He didn't qualify the statement to the FBI in 1951. He said it was the early part of 1932.

We showed that when he testified on the first trial about that matter against Travis in 1955, several years after he

had made the statement to the FBI on direct examination he said 1931 instead of the early part of 1932. But the worst thing of all, your Honor, and the conclusion I am trying to draw is inescapable, when he was cross-examined about that item by Mr. Menin on the first trial he again qualified even his answer on direct examination when he said 1931, to say, "Well, it might have been 1930." He was giving this testimony in 1955, four years after he had told the FBI it was the early part of 1932.

Finally—I am sorry I am taking so much time on this point, but, as I say, I think it is a very strong one for us—I want to point out what I think the man does with that, what he thinks he is doing, he is following the pattern of the psychological, pathological liar. I am using the words advisedly and in their technical sense, in as technical sense as I can.

[fol. 555] The Court: You are not testifying as an alienist?

Mr. Witt: No, but I am testifying as a lawyer who has had to deal unfortunately with characters of this kind including Matusow in the Jencks case, and this item about when he joined the Communist Party in that sense is a classic as far as such pathological liars are concerned. Since in their own minds they are crusaders or agents of the Government anything goes, and they become very astute and very quick in being able to change their testimony especially on cross examination in order to help the case of the Government and help them put the dagger in deeper into the back of the defendant, and that is what this man did when Sam Menin cross-examined him on the first trial, and that is why I dwell on it without going into the rest of the record on this point.

Now, finally, and then I will make one short reference, I hope it will be short, to the Jencks case, your Honor will recall that I cross-examined the man yesterday about his testimony with respect to the presence of Graham Dolan at the Horowitz meeting and at the St. Paul convention in 1947 and then with respect to his testimony about Chase Powers' presence at the meeting of the Steering Committee before the February, 1946, Board meeting in the presence of Chase Powers at the February, 1946, Board meeting. Your

Honor, we hope that before this case is over and after we have put in our case we will prove to the satisfaction of any open-minded rational human being that Dolan was not with Mine-Mill in July and August, 1947, that the office of Director of Education was set up at the St. Paul convention, as I brought out through Eckert, that Dolan wasn't hired for that job until November, 1947, and in July and August of 1947 when the Mine-Mill office was still located in Chicago Graham Dolan was living in Denver editing a periodical which he continued to edit at least through August of 1947 and perhaps later.

With respect to Powers we hope to be able to show before this case is over that in the forepart of 1946, certainly on February 6, 1946, when that Board meeting began and for a period before that back into 1945, I don't have the exact dates yet, poor Chase Powers was in a sanitarium in the West because of his working in his youth in the tunnels and in the mines as a result of which he contracted tuberculosis. Isn't that true, Trav?

Mr. Travis: Yes.

[fol. 556] Mr. Witt: We will be able to show that up to the hilt if anybody wants satisfaction on that from the Mine-Mill records and if necessary from the records of the sanitarium on the West Coast.

Now, your Honor, I am not anticipating the case in the court to the jury on these issues of Dolan and Powers, but I refer to those, and we are prepared to leave it to whatever procedure will satisfy your Honor. We could I think consistent with the proper procedure make the request to your Honor that on the Dolan and Powers issues you stop and take evidence now as part of the hearing on this motion for the grand jury testimony, but this trial has been diverted so much and we feel we have taken so much of your Honor's time on these problems we won't press it.

The Court: That would do more than create a conflict in the testimony, would it? What would be established irrefutably by that? It would simply be a conflict in the testimony, wouldn't it?

Mr. Witt: That would show that this man is a deliberate liar.

The Court: That may be your construction. It might not be someone else's.

Mr. Witt: I say it and I say it advisedly.

The Court: I would say that, if it was established absolutely, it might prove that he is mistaken, but—

Mr. Witt: Let me tell you why I think as of now, if we are able to show what I have said, we show about Dolan and Powers that this man is a deliberate liar. I say it because of his answers on cross examination.

The Court: That is a question for the jury.

Mr. Witt: I understand it, but as far as this present issue is concerned it is a question for your Honor, and I want to say, to point out to your Honor why I think his testimony under my cross examination shows conclusively that he is a deliberate liar. It will take me just a minute on [fol. 557] each of these people, Dolan and Powers. On Dolan as soon as I got into that and he saw the direction of my testimony he caught himself, he remembered, and he was ready with his answers in the same way that these kind of witnesses always are, and he began to hedge about what Dolan's job may have been, there may have been other people there in addition to Communist Party leaders and so forth and so on.

And it was worse, your Honor, in the case of Powers, because as soon as he saw himself getting into trouble he, himself injected the fact—I may be overstating the record but I don't think I am—he, himself injected the fact that in February, 1946, Powers may have been in the sanitarium, and what was he doing but anticipating me? He knew that when he took the stand on direct examination and didn't qualify it, didn't ask himself any questions, he knew that the Board minutes for the February 6, 1946 meeting showed that Powers wasn't there and that Travis was there as Board member for District 7 which was Powers' District, and he knew that at that time because Powers was in the sanitarium Travis was the acting Board member.

He has given copies of those minutes to the prosecution. He had testified about that before. So, that is why I say I am sure in my mind that he was deliberately lying about Powers, and finally on that we showed that when he testified about that Steering Committee meeting prior to the Febru-

ary 16 Board meeting on the first time I think it was before the CIO, I could be wrong, he didn't say the Steering Committee was there, which would have included Powers, he said himself, and Travis and Skinner, the other three people he said of the Steering Committee were there, and he didn't say Powers. Powers gets into the act as the years rolled by, and this man becomes more and more pathological.

The Court: What is the legal basis you are contending that entitled you to see the grand jury minutes is what I am talking about.

Mr. Witt: May I stop a minute and talk to Mr. Deikman? First, before I get to the grand jury point, itself, your Honor, in referring to this witness's failure of recollection in all kinds of points including points in which he should obviously have recollection—

The Court: That goes to his credibility.

[fol. 558] Mr. Witt: May I finish my sentence? I have a distinct reference in mind.

The Court: All right.

Mr. Witt: I have in mind Mr. Justice Brennan's opinion in the Jencks case. Of course, the Jencks case didn't deal with the grand jury issue, but this is the reference, and this is the connection. I don't have it here with me, the opinion.

The Court: Where is the Jencks case.

Mr. Witt: We may as well get it. This is at page 667 of 353 of the official Supreme Court reports, and I will quote the paragraph if I may, your Honor. It is not very long. "The crucial nature of the testimony of Ford and Matusow to the Government's case is conspicuously apparent. The impeachment of that testimony was singularly important to the petitioner. The value of the reports for impeachment purposes was highlighted by the admissions of both witnesses that they could not remember what reports were oral and what written, and by Matusow's admission: 'I don't recall what I put in my reports two or three years ago, written or oral, I don't know what they were.'"

If your Honor doesn't mind, I think I will adopt Mr. Kelley's suggestion and read the next paragraph in that also. It is not too long. "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls

treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

So, we say from that, your Honor, that aside from the inconsistencies and the contradictions that the record this witness has made against himself in terms of his not remembering under cross examination and in the interrogation in Chambers justifies this motion under the cases.

Now, on the cases, your Honor, in the argument on that [fol. 559] there are cases without now getting into an argument on side issues, I think both sides can agree there is no doubt that there are cases holding that under Rule 6 (e), the so-called secrecy rule, since that rule was adopted, and the cases prior to the rule, the cases since the rule despite the language of the rule that on the proper foundation the trial court may order the production of grand jury testimony. Now, the issue becomes what is a proper foundation. There are cases, and I don't think there will be any dispute about it, in which for one reason or another what the witness testified to on a particular point before the grand jury developed in open court and developed in open court that the witness's testimony before the grand jury was inconsistent with or contradicted the witness's testimony in open court, and there can't be any question about those cases.

Now, here we are faced with a somewhat different fact situation, if the Court please. Your Honor is not permitting us to interrogate this man about his testimony before these three grand juries, the two in Denver and the one in Washington in the Gold case and the one meeting he testified about behind closed doors although, if your Honor did, we are quite sure in view of what has happened on cross examination of this man as to what would happen. We are quite sure, if we took him through each item of his direct testimony on this trial and asked him what the testimony was before the grand jury here in 1954 and perhaps in 1956

and asked him about his testimony in the Gold Grand Jury about the New York trade union meeting, he would say and my guess is with respect to each item of his testimony that he does not remember, so, we would not be advanced. But we would be interestd in trying that, if your Honor is so disposed. But aside from that we think we have a sufficient record without getting that kind of answer out of him or without getting him to admit that he perjured himself before one of these grand juries because of the points I have made because of the inconsistencies and contradictions we have already shown because of the extent to which he claimed his recollection fails him at each point where he thinks he is getting into trouble because of his pathological hatred of the defendant and everything I said in that connection because of these items of evidence showing that he has been going out of his way to tailor testimony over the years and all these other things that I said we think at the very least we are justified in urging your Honor to examine his grand jury testimony to see in what respects it departs from his testimony in this court on direct examination.

[fol. 560] The Court: Well, do you have any authority you wish to call to the Court's attention where under a situation generally analogous to the one we have here that the court ordered the grand jury records produced? Do you know of any case?

Mr. Witt: Your Honor, we have no case where we have a situation quite like this. The cases, as I said, are very clear about the contradiction need only be on one material part of the testimony as it develops in open court, and there are cases, as I said, which hold that the witness's testimony on that point should be produced for the Court first and that, if it turns out to be useful to the defense on cross examination, it is turned over to the defense.

We are saying that we are dealing here not only with an analogous situation but a much stronger one because of the nature of this witness, the volume of the inconsistencies and the contradictions and everything else as I have said and the obvious difficulties of getting this witness to admit that he gave testimony before a grand jury even if your Honor permitted us to interrogate him about his testimony before these grand juries, the obvious difficulty of

getting him to admit that he gave testimony before any grand jury inconsistent with his testimony on direct examination.

We say finally, your Honor, that elementary justice requires this: That the prosecution should be delighted to cooperate, because our minimum request is not that we examine this grand jury testimony but that your Honor do it. We know it is a terrifically burdensome task for your Honor, but we see no alternative in justice to our own cause, and we will be satisfied if your Honor looks at his own testimony and is satisfied that it is consistent with his testimony on direct examination on these different questions, that will be that, but we happen to be convinced that, if your Honor does that, your Honor will discover that this man was not only further inconsistent when he testified before these grand juries but in addition, if I am right in calling him a pathological liar, must really have spread himself to hurt this man Travis when he testified against him behind closed doors.

We say the whole philosophy of the whole Jencks case, the whole philosophy of these other recent decisions of the Supreme Court requires the Government in the interests of [fol. 561] decency and in the interest of disclosure of all the facts to cooperate in this enterprise and make this testimony available to us, but, if the Government isn't disposed to do it, we think the least they should do is at least voluntarily agree to make his testimony available to the Court.

The Court: Did you have anything to say?

Mr. Kelley: Well, I think most of what Mr. Witt has said isn't in the nature of argument at all, and I don't think I would care to dignify very much of it by responding. It seems to me it is the culmination of his wanting to vent his spleen here in attacking and castigating this witness.

Mr. Witt: I have no spleen. I am a lawyer. I am interested in the Constitution of the United States. I am interested in doing of justice by my Government.

Mr. Kelley: He has talked about pathological hatred of this witness toward Mr. Travis. There has been no evidence of that. The only pathological hatred that has been evinced here was that which counsel exhibited this morning when he went into a rage.

Now, we get down to the legal argument.

Mr. Witt: I move that be stricken.

The Court: I think we had better refrain from personalities about counsel. I am interested in argument.

Mr. Kelley: We will get down to the legal part of it. He is asking for grand jury testimony of this witness on two occasions.

Mr. Witt: Three occasions.

Mr. Kelley: You are even asking for another jurisdiction, is that right?

Mr. Witt: That's right, because that is relatively simple in terms of his testifying as to only one event, that meeting in 1948. Again, as I said the other day, we assume that a copy of that is in the possession of the Department of Jus-
[fol. 562] tice somewhere or other.

Mr. Kelley: Well, what he claims in his argument is that he has thoroughly impeached the witness already so that, if that be true, all he is asking for is some cumulation of impeachment material. He says that there is not a single instance of consistency in the testimony of the witness on any, as to any of these occasions he is testifying about.

The substance of what occurred there, the part that the defendant had in those situations has been consistent and not one inconsistency has been pointed out. Mr. Travis has been named at all of the meetings on every occasion whether he was testifying against Travis or someone else.

The requirement that the matter be produced especially as to the second grand jury in this jurisdiction is in my judgment a fishing expedition to prepare for the trial of the 14 defendants, and counsel has indicated that by asking specifically about some who were indicted here. It would be a burden on the Court, additional burden when this case is presented, one of the most unusual burdens I have had the experience of seeing placed upon a court, to have to go over that testimony and keep in mind all of the testimony that has occurred in this trial or to check with the record in order to determine whether there were any of these minor inconsistencies. I think it is purely a matter under the rules and under the law within the discretion of the Court, and I believe that Judge Swan's language in the United States vs. Alper, Second Circuit case decided June 20, '46, 156 Federal Second 222 at page 226 is particularly appropriate for the Court's consideration.

In this case, your Honor, the case was reversed on other grounds, and the Court pointed out some guides for the trial courts in connection with whether or not grand jury testimony should be given in the exercise of the Court's discretion, and these are some of the guideposts for the courts to follow in this situation, and I quote: "These will include the timeliness of the request for the minutes, the delay in the trial which may result, and the extent of the burden which will be imposed upon the judge by the comparison of the witness's grand jury testimony with his trial testimony. If the witness's grand jury testimony is very lengthy, it would be an intolerable burden and would delay the trial to require the judge to go through it on the [fol. 563] mere chance that some inconsistency favorable to the accused might be found. The trial of an indictment is of course an inquiry into the truth of the charge; but in such trial the judge must be as little an advocate of the accused as of the prosecution. When the testimony before the grand jury is in small enough compass to make any contradictions between it and the witness's trial testimony readily discoverable it is a tolerable duty to impose upon the judge an examination of the minutes. But to demand that he peruse many pages of an examination of a witness to discover possible contradictions is altogether to falsify his position; for then he becomes in effect an active assistant of the defense. He would have to bear in mind all that the witness had sworn to, and pick out from a mass of what may be, and usually is, verbiage any parts that may be contradictory. That involves an active participation favorable to one side, which should not be required. A great part of the law of evidence is based upon the practical difficulties that would incidentally arise from the admission of what, strictly speaking, is logically relevant; it is founded upon the recognition that here, as elsewhere in the law, we are seeking not logical perfection but the just settlement of a controversy."

Then there is just one other thing I want to mention to the Court, and that is this: That the standard of memory that Mr. Witt would impose upon a witness is absolutely inhuman and one which I do not believe any court would impose, and we respectfully urge that the request for the grand jury minutes in any of these instances be denied.

Mr. Witt: May I say a word, your Honor?

The Court: Yes.

Mr. Witt: Just on the motive that Mr. Kelley imputes to us in connection with our motion for this man's testimony before the 1956 Grand Jury, again, perhaps we did not make ourselves clear. We asked this man about Durkin, Marcotti, and Sanderson, three of those indicted in 1956, aside from Travis and the other ten, not to indicate that we are entitled to his testimony in 1956 about Durkin, Marcotti, and Sanderson. That is not included in this motion. We went into this man's testimony about Durkin, Marcotti, and Sanderson in open proceedings from a different point of [fol. 564] view which I tried to make clear to show how this man thinks and how he operates, but to make the record entirely clear our motion doesn't encompass that.

Our motion with respect to the 1956 grand jury testimony goes only to testimony we gave about the matters he testified to on direct examination, all by definition pertaining to Travis. Now, true, some of these other people will be mentioned, but that is unavoidable, and there will be on the face of it again by definition no discovery in that testimony unless this man has told different stories, because we are asking for his grand jury testimony which parallels his testimony in open court.

Now, secondly before I get to the Alper case, a word on what Mr. Kelley had to say about the standard of memory that I seek to impose on the witness, I think Mr. Kelley distorts the argument. Of course, even the witness one of the few times I think he said anything on direct on the witness stand is right in saying that you can't expect people when they talk in '50 and '53 and '54 and '55 and '57 and '58 about a meeting which was attended by 15 or 20 or 30 people in 1946, '47, and '48 to name the same people all the time. I recognize that is not how the human mind works, that is not how our memory works. But that is not our argument with respect to this record. We think this record goes far, far beyond that, and that just is not a question of memory for a man to come out with a different list of names beginning in 1950 and then continuing into '53 and '54 and '55 and '56 and '57 and '58 about these very important matters which are important in this man's life if only because he has testified about them so often and all the rest of it. But I don't

want to repeat my argument as to memory, but I think Mr. Kelley distorts it.

As far as the Alper case is concerned, if the Court please, there are two phrases in the part of the opinion which Mr. Kelley read to which I want to draw your Honor's particular attention. The first is contained in the following sentence which Mr. Kelley has already read, but just to isolate it, "If the witness's grand jury testimony is very lengthy, it would be an intolerable burden and would unduly delay the trial to require the judge—"

The Court: This part about the burden on the Court, I am [fol. 565] not concerned about that.

Mr. Witt: I want to say a word about that later, but let me make this other point first, if the Court please. "— is very lengthy, it would be an intolerable burden and would unduly delay the trial to require the judge to go through it on the mere chance that some inconsistency favorable to the accused might be found." We agree with that aside from the burdensome part. We agree with the part where the court says there the trial court should not be required to go through it on the mere chance that some inconsistency favorable to the accused might be found. We are not asking that.

We are asking for the production of these minutes, because we think we have laid a foundation so that it won't be a fishing expedition, it won't be a mere chance. We are morally convinced that this man's grand jury testimony, and I will talk about the most important episode, is grand jury testimony in 1954 before the grand jury which indicted this defendant in this case, we are morally convinced that your Honor will find in examining this man's testimony before that grand jury that time after time after time after time he said inconsistent things before the grand jury compared with his testimony on direct examination on those matters. That is the first reference in that opinion I had in mind.

Again, along the same line a few sentences down the Court says, "But to demand that he peruse many pages of an examination of a witness to discover possible contradictions is altogether to falsify his position; for then he becomes in effect an active assistant of the defense." What I am drawing attention to there in that sentence, your Honor, is the reference to requiring the trial judge to do this

job to discover possible contradictions. We are not asking that be done. We say, again, we have laid a foundation, and we think we have shown inconsistencies and contradictions already. If we are right as to what we have shown, even if there is grand jury testimony that is consistent on many of these things with his testimony on direct in this case, it would necessarily be inconsistent with what he said about those things in open court on other occasions.

Finally, if I may impose on your Honor despite your indication that you are not impressed with the argument that it would be too great a burden on the Court, I think the [fol. 566] emphasis in that part of the opinion, the emphasis that Mr. Kelley is leaning on is somewhat peculiar and illogical If the Court were saying in that opinion, "If the job is an easy one, you can just look at a sentence of the testimony and get the job done, and that is all there is to it, then you do justice to the defense and have the trial court look at it. But if the job required in looking for inconsistencies is with respect to 10 or 20 or 30 matters, then, it is too burdensome for the Court to do it," in other words, the stronger your foundation is then the less you are entitled to production, and we don't think that makes any sense. In any event, if Mr. Kelley is fearful this is too great a burden on the Court, the defendant will be very happy to undertake the burden if the Court orders the production of the grand jury testimony directly to the defense.

Mr. Kelley: These things have been testified to in many, many proceedings. Has there ever been a contradiction in any one of them by anybody?

The Court: I am going to inquire a little bit. That is the very thing I would like to hear about, Mr. Witt's version of that. You call these variances in the testimony that have been pointed up. Let's discuss first these questions of attendance. On one occasion say the witness testified certain persons were there, on another occasion he omitted one of them and put somebody else in, is there an inconsistency in that? Doesn't that simply show maybe something that would reflect upon the quality of his memory? But where is the inconsistency?

Assume by way of illustration, if one of us were testifying about this meeting right here today or this gathering here in Chambers and we were asked to mention those who

were present and we named, someone named four or four (sic) that were present and said there were four or five more present whose names he could not recall, then at a subsequent time the same witness was asked the same question and he named four people and possibly named a different one or even two different ones than he named in the first instance, that would be something that would be considerable with respect to determining his quality of memory, but where would there be any inconsistency when it has never been shown in this record so far as I know, makes no indication that anyone that he has placed at these meetings was not there. In other words, there is no contradiction of his testimony with respect to these people [fol. 567] being present. He may have named one in this trial and one in another and somebody else in a third trial but always, as I recall the evidence, it was a meeting where there were a considerable number, at some of the meetings 75 or 100 or something like that.

There is no testimony that he was roping in the people he designated these various times or that he was telling an untruth about that. It simply was that he mentioned names at different times. Now, that is a variance that is true. As I say, that is a matter for consideration by the jury with respect to considering his ability to recall and remember and apply that test to his other testimony, but where are these inconsistencies that you are talking about in the evidence in that particular class? Let's confine it to that group, and that is the bulk of what your contention is based upon.

Mr. Deikman: I have a thought on that that I would like to express, and then Mr. Witt will have the opportunity to expand on that. Mr. Kelley has deprecated the value of the inconsistencies between the names at the same meeting related on different occasions. Your Honor, the only thing that is shown in this trial is the meetings, and these meetings are all related, are related to the defendant Travis, and the only way that we can show the inconsistency is to show how he varies those meetings from testimony to testimony, so that what is inconsistent here is not the individuals who were present at that meeting but the character of the meeting as well.

The Court: I don't know, where is there any inconsistency about that at all? I haven't heard anything that would make an issue of that.

Mr. Deikman: Your Honor, to say that a meeting involved somewhat less than 75 people on one occasion and to say that the same meeting involved 100 people—

The Court: I was going to mention that a moment ago, that is a question that goes to the credibility. There is nothing in the way of any basic contradiction. 75 more or less or 100 it would be inclusive of 75. That is a matter that merely goes to the witness's credibility and doesn't—well, it is just a matter to consider by the jury with respect to the weight to be given the testimony. There is noth-[fol. 568] ing that would give a basis in that circumstance to say that the testimony of the witness is untrue. That is just an estimate. A man could guess it is 100 feet across the street, and then the next time he says it is 50. That goes to the weight of his testimony.

Mr. Deikman: The point I was making, the point we are interested in is the inconsistencies of the meetings themselves and not the inconsistencies of the people who attended. But more important I think is this: It seems to be almost implied in what your Honor is saying and what Mr. Kelley has said that inconsistency implies the witness must be shown to be lying. That is not the case. An inconsistency may arise because of faulty memory, and when you go back to experiences which are supposed to have happened to the defendant in 1942 and which the defendant and in which the witness is supposedly testifying with an accurate memory and then you show consistently page after page that his memory is faulty and that he changes the names of people at these various meetings, then these inconsistencies of as high a degree and of as high a character as an inconsistency where you show it is possible that he is downright prevaricating are worthy of consideration.

The Court: That is a matter for argument, because, as I said, to take the illustration I mentioned a moment ago, if you were called as a witness in a case involving this meeting here today and named Mr. Kelley and Mr. Witt and Miss Marson and myself and could not recall other names and a year afterwards you testified about the same meeting and mentioned that Mr. Eich was here, does that relate to your veracity or to the truth of your statement and when the fact is that all of us were here, the whole five that have been named, four one time and the fifth one the next time?

It simply goes to the question of the reliability of your memory which is a thing for the jury to determine.

Mr. Deikman: And it goes to show that there are enough inconsistencies in my relation of an event to show that there may be an inconsistency as to what I have said occurred at that meeting.

The Court: That is a question for the jury.

Mr. Deikman: No, it is an inconsistency about the meeting and what was said at the meeting as a part of the meet-
[fol. 569] ing and who was there at the meeting as a part of the meeting.

The Court: Actually, anything that reflects upon a witness's credibility can be attributed to an appraisal of his whole evidence. Now, further, these incidents here, for example, about when he joined the Communist Party, which as I recall from the evidence he mentioned three years which he mentioned three different times, that simply in my estimation, that relates to the question of the weight to be given his testimony. I know of none of these cases in which any court has ordered the production of grand jury testimony that you didn't have something in the way of some positive material, an almost conclusive fact that was involved in the proceeding. These matters that we are talking about now, who were at those meetings, when, as I say, it is not contradicted in the record at all that anyone that he has mentioned was not there whether he mentioned it at one trial or another.

Another thing is that this witness has testified numerous occasions, his testimony has been transcribed, and these variances that are pointed up are the result of a minute comparison of the testimony at these trials, and there are very few witnesses whose testimony given on a number of occasions would not be subject to some variances either in method of statement or fact. None of these matters that we have talked about here at these meetings, who were present, when, I repeat again there is no dispute as far as the record now that the people were there. It is simply that he didn't mention at some time a person and mentioned that person at another time or omitted him at another time. Those are not vital it doesn't seem to me any more than this question of when he belonged or joined the Party, because those all are matters that go along with the many other things

that you delved into, things that the jury can consider in determining what weight should be given his testimony just like any other witnesses.

Now, this prejudice business, I don't know, that, again, is a thing that goes to the weight of his testimony. I know of no case in which the Court can say arbitrarily the witness's testimony will be disregarded because he is prejudiced.

Mr. Witt: We are not asking that.

The Court: I am assuming that there may be some degree [fol. 570] of prejudice. There seems to be an antipathy between the defense side and the witness and the witness and the defense, but, if pure hatred, if you want to put it that way, were considered in a murder trial where the spouse of the murdered man were testifying against the defendant, no one could say because she hated the defendant she was disqualified as a witness.

So, the whole thing seems to be a situation where these matters that you are urging on the Court are simply matters that go to the credibility of the witness's testimony and the weight to be given his testimony and under no case that I know anything about, and there is no case that has been called to my attention that would include within its framework a situation like that as being one for the production of the grand jury records. So, as I see the matter, there has been no showing made here that would warrant the Court in ordering the production of the grand jury records even for inspection by the Court or for direct use by the defendant.

Secondly, and, of course, it is beside the point, in view of my thinking on the main question I am rather satisfied that the Court would be absolutely without power to compel the production of grand jury records in some other district, I am satisfied about that, because those are under the control of the court in that district, but that is clearly beside the point. I want to emphasize again that the amount of work and labor that might be imposed on the Court in looking over any grand jury records is not a factor in my consideration of the case at all. If the defendant is entitled to that right, I am willing to do the work that would be incident to looking the records over, but what I am satisfied is that there is no foundation here laid by the factual

situation that would warrant the Court in ordering the production of the grand jury records.

Mr. Witt: May I make a short statement for the record?

The Court: Yes.

Mr. Witt: We do not want to press your Honor any further if your Honor is satisfied, but we do want to make our position clear on the record. Just in passing, it is not important and I am sure your Honor didn't intend it that way, [fol. 571] your Honor was talking about this qualifying witnesses. That is not what we are seeking. Of course, we agree with your Honor that as the record now stands in open court the witness's credibility is for the jury, and we are not asking that your Honor throw this testimony out at this point. We are asking merely a further investigation which we think is justified, but as I say that is not too important.

Secondly, just again more or less in passing, your Honor, on the question of when this man joined the Party and why I had to take a few minutes with it, of course, people talking or testifying a quarter of a century later about certain matters may not remember the year, but my point about it, the one I tried to make earlier, your Honor, and that is why I come back to it, because I do think it is one of these little flashes you get in a trial which reveals the character of a witness, in the first place, joining the Communist Party is taken to be an important step for any person to take in this country and obviously was a very, very important step for this man, because, if he was telling the truth to the FBI in 1951 that he joined the Party early in 1932, within a very short time thereafter, I forget the month but it was still 1932, he was selected to go to Moscow, your Honor.

So, that highlights the fact that it would be highly abnormal for this man to forget normal operations of the mind in terms of memory that it was 1932 that he joined the Party especially for him to forget that or to change it after 1951, because he sat down in his own handwriting and made a statement about that matter for the FBI, but, as I say, I don't want to spend too much time on it.

Next, your Honor, I didn't mention this variance in this estimate.

The Court: No, you called them inconsistent.

Mr. Witt: I am going to something else. I am sorry.

I am referring to the meeting at the Russian Cooperative Restaurant which your Honor referred to in passing a few minutes ago. That to me, your Honor, is another one of these little flashes that you get in the testimony of a witness for this reason; The record shows that he estimated on the prior occasion whenever that was that there were 100 [fol. 572] or more, maybe he said a little less, that was the prior occasion, while on his testimony here last week on direct he said 75 using a qualifying phrase indicating maybe less rather than more. But it doesn't matter. We will leave all the qualifications to one side.

Mr. Vincent: That doesn't state the record accurately.

Mr. Witt: Let me make my point.

Mr. Vincent: I wanted to make it clear that wasn't accurate.

Mr. Witt: I am leaving aside the qualifications, your Honor. It just isn't normal for a man with the passage of years to reduce his estimate of the number of people at a meeting which which (sic) he has been testifying for years, and it is clear from what your Honor said about the way this man has been subjected to cross examination over the years that he was deliberately curtailing that figure in order to avoid difficulty on cross examination. On the prior occasion he said 100. He felt he could get away with it more easily. This time he figured he had better drop it to 75, and the individual doesn't work that way in terms of normal memory, your Honor.

I have two points now if I can make them very brief.

The Court: I just want to say in connection with what you have said, the reason I pointed out about this matter being, the matter of his credibility and the weight to be given his testimony being a question for the jury I understood your position here to be in this argument that his testimony and these variances that I have mentioned were such that the Court should say that he was absolutely beyond belief and that, therefore, we should get this other matter to further substantiate your contention along that line. If I misunderstood your argument, I commented on those things.

Mr. Witt: It is probably my fault because of the vehemence with which I express myself. Your Honor, it is true that I was saying in our opinion this man is absolutely

unworthy of belief, but in connection with this motion we do not think it is necessary for your Honor to go that far without asking your Honor to do that. All we are saying to your Honor is that the record as it now stands we have [fol. 573] cast sufficient doubt on his honesty to warrant your Honor in the interests of justice to use the phrase Rule 6 (e) I think uses, to justify taking a look-see at what he said behind closed doors. If we turn out to be wrong, we are wrong. I won't hate or love this man any more or less despite what Mr. Kelley says. I have a little more confidence perhaps in our system of justice either way. But all we are asking is that we take a look.

The Court: But over the years I want to point out again, I haven't made a very detailed search on this question, but the cases are few and far between, I think that is a fairly accurate statement, in which grand jury records have been produced. There is generally as far as I know some very specific thing that happened factually in those cases that warranted the Court to produce them. In other words, they are generally not produced merely on suggestion of some inconsistency even with the witness's statement but something that goes to the very basis of the matter, and that is what I was attempting to point out, and I don't expect there will be any particular object in discussing this. I am satisfied the motion should be denied. What else were you going to mention?

Mr. Witt: I was going to say a few more things in support of the motion, but in view of your Honor's ruling I will make every effort to keep quiet. I think we are done on this.

Mr. Kelley: I want to ask that the witness be excused.

The Court: Do you have any objection to his being excused?

Mr. Witt: No, we have no use for him, your Honor.

The Court: You can show the defense has no objection to his being excused.

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[fol. 582] In Open Court

The Court: The government may proceed.

Mr. Kelley: We would like to call Mr. Fred Gardner to the stand.

The Court: He may be sworn.

[fol. 583] FRED GARDNER, a witness called on behalf of the Government, testified:

Direct examination.

By Mr. Kelley:

Q. Will you state your name, please?
A. Fred Gardner.
Q. And where do you live, Mr. Gardner?
A. 615 West Park, Butte, Montana.
Q. And how long have you lived in Butte?
A. Since February, 1954.
Q. Have you now or have you at any time been a member of the Communist Party?
A. I am not now a member of the Communist Party. I have been.
Q. During what period of time were you a member of the Communist Party?
A. From 1933 to 1955.
Q. Now, are you now or have you ever been affiliated with any trade unions?
A. Yes, sir.
Q. And will you relate your trade union history?
A. From 1933 to about 1936 I was in the Building Service Employees International Union in New York City. From 1936 to 1950 I was an International Representative of the United Electrical, Radio & Machine Workers, from 1951 to 1955 I was employed as an International Representative of the International Union of Mine, Mill & Smelter Workers, and from 1956 until the present time I am presently employed as Consultant and Conciliator of the International Hod Carriers, Building and Common Laborers Union of America.
Q. At the present time do you have an assignment elsewhere than Butte?
A. Yes, sir, at the present time I am employed in Anchorage, Alaska.
Q. That is a temporary assignment, is it?
A. Yes, sir.
Q. Now, are you acquainted with Maurice E. Travis?
A. Yes, sir.

Q. And did you become acquainted with him during the time that you were with the International Union of Mine, Mill & Smelter Workers?

A. Yes, sir.

Q. When did you first meet Mr. Travis?

A. Well, to the best of my recollection I first met Mr. Travis at the airport in Buffalo, New York, in the fall of '51.

Mr. Kelley: Now, Mr. Witt, do you want the witness to identify Mr. Travis?

[fol. 584] Mr. Witt: No, we will stipulate that the witness knows Mr. Travis and Mr. Travis is the same Mr. Travis that is the defendant in this court.

Mr. Kelley: Thank you.

Q. At the time you met Mr. Travis at the airport at Buffalo, New York, where were you living?

A. I was living in Cleveland, Ohio.

Q. Where were you working at the time?

A. I was working in Cleveland, Ohio.

Q. And that was with the Mine-Mill Union?

A. Yes, I was an International Representative of the Mine, Mill & Smelter Workers.

Q. Did you meet anyone else at the airport in Buffalo at that time?

A. Yes, sir, Jack Clark, the International President of the Union came in at that time.

Mr. Witt: I am sorry, Mr. Kelley. May I have the last question and answer read back?

(The reporter read the last question and answer.)

Q. Now, after you met Mr. Travis and Mr. Clark what did you do?

A. Well, we proceeded from the airport to Port Colborne, Ontario.

Q. On what means of transportation did you use?

A. I had a vintage Chevrolet coupe that I drove over to Port Colborne.

Q. And then where did you go in Port Colborne?

A. To the home of the Business Agent of the Port Colborne Local of the Mine, Mill & Smelter Workers.

Q. And then following this occurrence or this going to the home of the business agent did you go somewhere else?

A. Well, yes, we left there, and at the suggestion of Mr. Travis I put my car in the garage so that the Canadian Police would not be able to identify my car, and we got in a staff member's car in Port Colborne and drove to a town, I believe it was Welland, Ontario. I could be mistaken on that town.

Mr. Witt: I am sorry, may I respectfully request that your Honor direct the witness to keep his voice up?

The Court: Will you speak a little louder so the Jury [fol. 585] and counsel can hear you?

The Witness: Yes, sir, I shall.

Mr. Witt: I make that request, if the Court please, because there are one or two parts of that answer I didn't quite catch. May I have it read back?

The Court: You can have it read back, and then you can speak a little louder.

The Witness: Yes, sir, I shall.

(The reporter read the last question.)

Mr. Witt: I now respectfully move that that part of the witness's answer relating to what he did with his car and to Travis's suggestion and the purpose of it be stricken as being irrelevant and prejudicial.

The Court: I understand that was Mr. Travis's statement to the witness from the way he testified, wasn't it?

Mr. Kelley: Yes, that's right.

Mr. Witt: Well, he didn't say anything about that.

The Court: That was the import of the answer.

Mr. Witt: He said what happened. He didn't say what he said to Travis or what Travis said to him about that. Let the witness testify about that.

Mr. Kelley: We will cover that in that way if you like.

The Court: The motion to strike will be denied.

Q. Now, before you left for Welland, Canada, from this Business Agent's house did Mr. Travis make any statements in connection with the means of transportation?

A. Yes, sir, he suggested that I put my car in the garage at the Business Agent's home to avoid the Canadian Police

being able to check the car and find that it is a representative of Mine-Mill's car, and we proceeded to Welland in the car of one of the Canadian staff members.

[fol. 586] Mr. Witt: May we approach the Bench? I have an objection to this whole line which I do not think should be made in the hearing of the Jury.

(Conference at the Bench.)

In Open Court

The Court: If you have any objection, Mr. Witt, you may proceed.

Mr. Witt: If the Court please, I make this objection because of what I happen to know, as I told your Honor and Mr. Kelley at the Bench, something about the history of the relationship between Mine-Mill and the Canadian Government and the Canadian Police, so that it appears to me that this line of testimony is irrelevant on the ground that the International Union of Mine, Mill & Smelter Workers has been organizing workers in the nonferrous metals industry in Canada since at least the '40's, and during all that time down to date the Canadian Government has been anti-union as far as that is concerned, as far as Mine-Mill is concerned, and has given everybody connected with Mine-Mill difficulty in doing their normal organizing and collective bargaining work whether those people allegedly are Communists or not.

As I said at the Bench, the Canadian Government has kept out people who Mr. Kelley would agree nobody has ever suggested were Communists simply because they were connected with Mine-Mill, so that, if all this is is (sic) going into that improper attitude of the Canadian Government which happens to be much better now, I think it is irrelevant and opens up a case within a case and has nothing to do with this defendant.

The Court: Of course, the Court does not have a purport of this witness's testimony, there is nothing at the moment that indicates it is irrelevant, and I assume that the Government, of course, has knowledge of the fact that the evidence must be relevant and its relevancy will appear. What is the situation, Mr. Kelley?

Mr. Kelley: That's right, your Honor. Its relevance will appear very shortly in this witness's testimony.

Mr. Witt: Will your Honor res[illegible]e ruling on the mo-
[fol. 587] tion and motion to strike pending Mr. Kelley's examination?

The Court: In the event it turns out to be irrelevant, you can object again, and, if there is anything that is received of that nature, you can move to strike, but the objection will be overruled, and you may proceed, Mr. Kelley.

Q. Mr. Gardner, after you left the Business Agent's house what occurred?

A. We proceeded to Welland where a meeting was held.

Q. And who accompanied you to Welland?

A. I was in the car of one of the Canadian staff members and Maurice Travis, and there were probably three or four staff members in the car. As I remember, we had four people in the car.

Q. And you went to a meeting at this other town?

A. Yes.

Mr. Witt: May the time be fixed, number one, and will Mr. Kelley ask the witness to name these people if he remembers.

The Court: You can do that if you wish to on cross examination. I do think the time might be fixed, Mr. Kelley.

Mr. Kelley: I thought we had fixed the time. You mean the time of day?

Mr. Witt: All the witness has said about the date is the year, if I recall, it was the fall of '51, but in view of our problems with the first witness—"Late '45" and "Early '46"—and that kind of business we would like the witnesses to be as specific as they can be about dates.

Q. Mr. Gardner, can you place the date when you met Mr. Travis, at the airport in Buffalo at this time?

A. To the best of my recollection it was September or October of 1951, and the only basis on which I fix it, it was a period of time when I had my old Chevrolet which I got rid of early in '53, and that was in the fall—or early in '52, and this was in the fall of the year when this

occurred, so, to the best of my recollection it would be September or October.

Q. Do you know with reference to when you became affiliated with the Mine-Mill Union whether or not this was [fol. 588] the first time you had met Mr. Travis?

A. Yes, sir, to the best of my recollection it was the first time I had met Mr. Travis.

Q. And about when did you go to work for Mine-Mill?

A. I believe it was the latter part of August or the first week of September, 1951.

Q. Now, do you recall the name of the Business Agent that accompanied you from his house over to Welland?

A. No, sir, I don't. I am completely unfamiliar with the Canadian staff, and I was—

Mr. Witt: Excuse me, Mr. Gardner. I move that the answer the witness gave after he said he doesn't know be stricken and the witness be cautioned not to make explanations each time he gives an answer.

The Court: No, the answer can stand. The motion will be denied.

Q. Did you know any of the other people besides Mr. Travis and Mr. Clark who accompanied you from this Agent's house to Welland?

A. No, sir, I was very new in Mine-Mill and was completely unfamiliar with these people.

Q. Now, did there come a time that evening when you and Mr. Travis were alone?

A. Yes, sir, we returned from Welland and picked up my car in Port Colborne, and he and I returned to Buffalo.

Mr. Witt: Excuse me. Did he say "he and I", Travis?

Mr. Kelley: Right.

Mr. Witt: I am sorry, your Honor.

Q. Mr. Clark then did not accompany you on this return trip, is that correct?

A. No, sir, he did not.

Q. Now, on the return trip did you and Mr. Travis have a conversation?

A. Yes, we did.

Q. Do you recall the substance of that conversation?

A. Yes, I do.

Mr. Witt: Excuse me, your Honor, if Mr. Kelley is going to another aspect of that incident, I think this is the point, I am not sure, Mr. Kelley can clear me up if I am wrong, this is the point at which I should make my [fol. 589] motion to strike. Mr. Kelley is now asking him a conversation with Travis after something or other took place in Welland. So, at this point I do not see the relevance of the witness's testimony about what was done with the car at the Business Agent's home and why what was done was done.

Mr. Kelley: I think counsel will as soon as this conversation is related, your Honor.

The Court: All right, the objection is overruled, and the motion to strike is denied, and the witness may answer the question.

A. Well, in substance we first discussed the fact that Travis had pointed out—

Mr. Witt: I object to this—I am sorry to interrupt the witness again—I don't want this general—

The Court: If you will let the witness answer the question, I think everything will be better instead of anticipating something he is going to say.

Mr. Witt: If it is prejudicial to the Jury, I think it is proper to interrupt.

The Court: The question simply was, what was the conversation, and that is what he is testifying to.

Mr. Witt: He said "we discussed". The witness should tell the Jury what he said and what Travis said in the normal way a witness testifies about conversations.

The Court: He can give what was said in the conversation. It is just a question of how to state it. Go ahead.

A. Travis told me that I had come to Mine-Mill well recommended and he was very happy for that, that the Communist Party of Cleveland had given me excellent recommendations when I came to Mine-Mill. Also, in the conversation returning from Port Colborne to Buffalo he indicated to me that, he told me that he had considerable difficulty in crossing the border into Canada because of his membership in the Party and because of his public resignation from the Party, that was printed in the Mine-

[fol. 590] Mill Journal in which he regretted the necessity of resigning from the Union because of the need for such resignation to conform to the Taft-Hartley affidavits.

I asked Travis if the AFL and some of the other CIO unions were having the same difficulty. He said no, the Canadian authorities in the main were putting the clamps down on the left-wing unions such as Mine-Mill and UE, and we very briefly discussed his resignation from the Party in which he pointed out that he believed that resignation, that public resignation was a mistake because it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely to conform to Taft-Hartley affidavits, and they recognized, the enemies of the Party recognized that this was not an actual resignation, and in substance that is about what we discussed. There were probably other matters of less importance.

MOTION FOR MISTRIAL AND DENIAL THEREOF

Mr. Witt: Now, at this time, if the Court please, I move for a mistrial on the basis of the speech that this witness made particularly his references to the attitudes of the Canadian Government, the Canadian Police, to so-called left-wing unions. Perhaps the motion would be out of order if this is the first time this Jury had heard material like this from the witness stand, but in view of like, similar references in the same area time after time by the witness Eckert this man's speech along the same lines hopelessly confuses the issues in this case, and it is impossible to believe that this Jury can perform its functions under the law. Finally, you will have noted, your Honor, that this man did not refer to simply the Communists as far as the Canadian Government is concerned, he referred to left-wing unions.

The Court: He is testifying to a conversation had with the defendant, and the things he has testified to are the things the defendant told him.

Mr. Witt: But, your Honor, if they talked about having breakfast or dinner together, it would not be relevant, and this is not only irrelevant but the point to the motion for

dismissal is that it is highly inflammatory and prejudicial. Even if it had probative value under the cases, if it contains the possibility of confusing or prejudicing the Jury, it is inadmissible.

[fol. 591] The Court: The motion for mistrial will be denied.

You may proceed, Mr. Kelley.

Mr. Witt: I now respectfully request the Court to caution the Jury that this man's statements about left-wing unions—

The Court: That is not this man's statement. Those are the words of Mr. Travis testified to by this witness.

Mr. Witt: All right, your Honor. I am probably wrong. Then, I will revise what I was starting to say. I respectfully request that the Jury be instructed that what this witness said Mr. Travis said about left-wing unions be disregarded, because that is not evidence against this defendant on trial.

The Court: The motion will be denied.

Q. Mr. Gardner, in your testimony relating to the conversation and particularly as to what Mr. Travis said I believe you said that he referred to resigning from the Union. If you made such a statement, would that be correct?

A. No, sir, he referred to resigning from the Communist Party.

Q. Now, directing your attention to the year 1953—

Mr. Witt: Excuse me, Mr. Kelley. Now that Mr. Kelley is very obviously going to another subject I now renew the motion to strike the witness's testimony about the disposition of the car at the Business Agent's home in Port Colborne and what Travis said to him in connection with the Canadian Police and so on.

The Court: The motion will be denied. The testimony will stand.

Q. Mr. Gardner, did there come a time when you left the Cleveland area and moved while you were still with the Mine-Mill Union?

A. Yes, sir. In early June of 1953 I was transferred to the Coeur d'Alene Mining District of Idaho.

Q. At that time did you have occasion to have a conversation with Mr. Travis?

A. Yes, sir, I was instructed by Mr. Travis on my way to the Coeur d'Alene mining district to stop in Denver for a briefing by him on the Coeur d'Alene situation.

Q. Did you come to Denver?

A. Yes, I did.

Q. And that was—

[fol. 592] Mr. Witt: Will the witness fix the place of the conversation in Denver?

The Witness: The conversation took place in the—

Mr. Witt: The witness hasn't been given a question. I was addressing the Court.

The Court: What was the question?

Mr. Kelley: Well, I was just laying the foundation, your Honor, to get to a conversation, and Mr. Witt has suggested part of the foundation which I intended to lay.

Mr. Witt: All right.

The Court: You may proceed.

Q. On your way from the East did you stop in Denver in June, 1953?

A. Yes, sir, I did.

Q. Now, when you got into Denver where did you go?

A. I went up to the International Office of the Mine, Mill & Smelter Workers.

Mr. Witt: I apologize for being persistent, and perhaps I am wrong, but, if I follow this thus far, the witness said that Travis told him to stop in Denver. Now, all I am suggesting is, so that the record will be clear and we will be able to cross-examine this man, is that we be told it was in a long-distance conversation or face to face—

The Court: You can ask him on cross examination. Mr. Kelley doesn't need to go into that. You can ask him that on cross examination. Go ahead, Mr. Kelley.

Q. I believe you stated that you went to the office of the Mine, Mill & Smelter Workers here in Denver?

A. Yes, sir.

Q. And did you see anyone at that time?

A. Yes, sir, I met Jack Clark, the International President for a brief greeting, and I spoke very briefly with Harold Sanderson who I believe at that time was Comptroller of the Union.

Q. Now, following the conversation or the period that you spent in the Mine-Mill offices did you then see Mr. Travis?

A. Yes, I was directed to Mr. Travis's home, and I went [fol. 593] there and remained there until the following day.

Q. Now, did anyone accompany you to Mr. Travis's home?

A. Yes, my wife and children.

Q. While you were at Mr. Travis's home did you have a conversation with him?

A. Yes, I did.

Q. And who else was present at that conversation?

A. Mrs. Travis and my wife.

Q. And when with reference to your getting to Denver did this conversation occur?

A. The same evening that I arrived in Denver.

Q. Now will you state the substance of the conversation with Mr. Travis at that time?

Mr. Witt: May I suggest in terms of what he said and what Mr. Travis said.

A. Travis informed me—.

The Court: Go ahead.

A. Travis informed me that there was a serious factional situation within the Communist Party in the Coeur d'Alene area in which the forces of Pete Piekarski, who was the Section Organizer of the Communist Party and an employee of the Bunker Hill and Smelter Mining Company, and Rudy Hanson, who had resigned as International Representative of Mine-Mill, on the one hand, were opposing the Rocky Mountain Regional Officers of the Communist Party and Chase Powers, the Board member of the Union for that particular district, and in view of the serious factional difficulty and in view of the fact that the opposition forces within the Party appeared to be in a majority in the State Committee that I had better re-

main aloof from any Communist Party activity in the Coeur d'Alene area during that period until and unless I was notified to take part.

Now, he also told me that Cozy Dolan, an employee of the International Union, had filed charges against Rudy Hanson with the State Committee of the Communist Party in Idaho and that those charges were in the process of being handled by the Party. He indicated and told me that there was some difficulty there, because the Hanson and Piekarski forces within the Party appeared to have a majority and it was pretty rough going for those people who were attempting to expel Rudy Hanson from the Party. He did, however, tell me that he felt certain that [fol. 594] this expulsion would take place and that as the matters cleared up in Coeur d'Alene I would be contacted by somebody from the Rocky Mountain Region of which I would be notified by him before that person came in so I would know who I was talking to and at that point I could reactivate myself in the Party.

Mr. Kelley: You may cross-examine.

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[fol. 598]

MOTION FOR PRODUCTION OF STATEMENTS UNDER SECTION 3500 AND FOR PRODUCTION OF GRAND JURY MINUTES AND RULINGS THEREON

Mr. Deikman: At this time the defense moves for production of statements under Section 3500 as previously requested in regard to the witness Eckert. In addition we move for production of all grand jury minutes in which this witness has testified before grand juries which we are advised he did do in this District in 1956, and he also testified, as Mr. Kelley advised us during the recess, before grand juries in other Districts on several occasions.

The Court: I think there has been no foundation laid for the production of any grand jury records, but what does the Government have to say with respect to records which may be demanded under Title 18, 3500?

Mr. Kelley: We have some none of which are wholly related to the testimony of the witness on his direct examination, so, it will be necessary to submit them to your

Honor for examination and excision of those parts which the defense is not entitled to, and we are prepared—

The Court: You are prepared to submit them to the Court right now? You have them available?

Mr. Kelley: We have all of them but two which are across the street, and we will get them immediately.

The Court: In those circumstances the Court proceeding under 3500, of course, will examine the items produced and will determine what should be furnished the defendant and what, if anything, should be withheld in light of your objection of turning them over to the defendant in their original form.

Mr. Kelley: Yes, and may I suggest that we proceed with the submission of these to you, proceed with the request made by the defendant to produce these documents, that we get them to your Honor just as soon as we can and that we, I will represent there aren't very many of them, and that we proceed to get the parts they are entitled to photostated, and we can complete this witness, at least get started on it early this afternoon?

Mr. Deikman: May it please the Court, we also move that we be given the same opportunity as we were in the case of the witness Eckert to go into the question of laying [fol. 599] a foundation for his Grand Jury testimony and in regard to showing the completeness of the reports which are submitted.

The Court: You will have that opportunity, and the Court simply denied your request now on the basis there has been no foundation. I assume that you are not ready to proceed with the cross examination until you have this material available to you, is that right?

Mr. Witt: It is not a question of whether we are ready or prepared to. Under Section 3500 we are entitled—

The Court: I understand that.

Mr. Witt: —to these documents before we go ahead.

The Court: Whether that be true or not the Court is not going to require you to go ahead if you tell the Court you wish to see these before you do go ahead.

Mr. Witt: Yes, and so it will save time later that is our position in the case of every witness.

The Court: Is there any reason we cannot continue with some other witness?

Mr. Kelley: Your Honor, if we get these documents to you for your examination—

The Court: What I have been trying to avoid throughout here is this constant excusing of the Jury and delays in the taking of the testimony, and, of course, some of that is probably unavoidable, and I have no notion about how long it will take to look over these reports or how extensive they are or how long it will take to provide photostats of the parts of any that are given to the defendant, and to have the Jury just waiting around while we are just doing all this is the thing that should be avoided if it possibly can. Is there any reason why we cannot proceed with some other witness and then furnish me with those at noon, and I will look them over during the noon hour? I have no idea how long it will take. Can't we proceed with some other witness rather than just having the Jury doing nothing in the meantime?

[fol. 600] Mr. Kelley: I think we are going to reach a point where we are going to have to do something other than during the noon hour without the Jury, and it seems to me we could expedite it about as well if we would get these to you right away so that we know what part is to be photostated and maybe by 1:30 or 2:00 o'clock the whole process could be done and we could go ahead with the cross examination.

The Court: Well, let me inquire, Mr. Witt, and this I am not insisting if this is not proper, I mean, if you have these reports, would you be able to proceed with the cross examination, or would you require time to examine the reports and consider what you wish to do? I mean can you make an estimate on that?

Mr. Witt: My guess would be, if the Court please, that we would want time to examine the reports, and then in reference to what Mr. Kelley had to say we will have to have the hearing in Chambers along the same line as we had with respect to the witness Eckert before we can go ahead and cross-examine this man. I thought we agreed yesterday in Chambers, your Honor, I could be mistaken,

that in any event we would not begin the cross examination of this man until Monday at the earliest.

Mr. Kelley: That, your Honor, was based on the proposition that Mr. Witt wanted the testimony of this witness in the Cleveland trial, and he has had part of it I think sometime last week and he has all of it now, and we have agreed that—

The Court: It is perfectly obvious, Mr. Kelley, and 3500 contemplates that situation, Mr. Witt doesn't know nor does the Court know what if anything will be furnished under this 3500 matter. They have a right under the statute after that is furnished, if they desire to look into any subject that is raised, to request a continuance of the examination until they have those facts. What I am trying to find out is whether we should proceed now with another witness and then excuse this witness for cross examination until this matter is all—until the defense is ready to proceed with cross examination or should we proceed with it and then go ahead with it and excuse the other witness?

Mr. Kelley: It is a complicated problem, your Honor. As long as counsel are sitting in Court and examining or we are examining a witness we cannot be looking over any report, we cannot be preparing them, and you cannot be [fol. 601] examining them, and I think the time to consider whether or not there should be a continuance is after we see what material is available to them from these reports which might require some justification for a continuance.

This man lives up in Anchorage, Alaska, and if we can within the realm of fair play get him off this witness stand this afternoon, we would like to do it. If we cannot, we are doing the best we can.

The Court: I am thinking about the Jury just coming down here for an hour or two and going home and waiting around in the interim and so forth. I do not know but what we can proceed with this other testimony. It is nearly noon now. I will recess now until 1:30, and you can produce this matter, and by 1:30 we can decide whether we will go ahead with another witness or what the procedure will be.

Afternoon Session

The Court: Before you proceed I might say to the Jury that you will recall that Government had completed the direct examination of the witness Gardner who was on the stand here before noon. The defense is not ready to proceed with the cross examination, so, the Government will proceed with the direct testimony of the witness now on the stand, and Mr. Gardner's cross examination will be held later. So, you may proceed.

William Mason, a witness called on behalf of the Government, testified:

Direct examination.

By Mr. Crandall:

Q. Would you please state your full name?
A. William Mason.
Q. And where do you reside, Mr. Mason?
A. Butte, Montana.
Q. Would you also tell the Jury and the Court your present employment?
A. I am a miner.
Q. And would you just briefly describe where you are employed?
A. At the moment I am employed by my brother in a small manganese mining operation.
Q. Are you married, Mr. Mason?
A. Yes.
[fol. 602] Q. And do you have any children?
A. Three.
Q. Have you ever been connected with the American labor movement?
A. Yes.
Q. And when did you first become acquainted with the labor movement?
A. In 1934.
Q. And what union was this in?

A. It was the Butte Miners Union No. 1 of the International Union of Mine, Mill & Smelter Workers.

Q. And where is this local located?

A. In Butte, Montana.

Q. Have you ever held office in that local?

A. Yes.

Q. And would you please state when and what offices you have held?

A. I was Walking Delegate for the Butte Miners Union.

Q. And what period was that?

A. In 1936 and 1937. 1939 and '40 I was Financial Secretary of the Union; 1944, President of the Union. I served as editor of the Union's paper and various other capacities from time to time.

Q. Did there ever come a time when you held office in the International Union of Mine-Mill?

A. Yes.

Q. And would you briefly describe or state what offices those were and the periods in which you held those offices?

A. The office I served in was Executive Board member for District No. 1 of the International Union. I served in that office 1941 and '42 and again from 1945 to 1953, inclusive.

Q. And you mentioned that this was District No. 1. Would you tell the ladies and gentlemen of the Jury what that district encompassed, the geographical area?

A. It embraced five states and two Canadian provinces.

Q. What states were those?

A. Montana, Colorado, Wyoming, the two Dakotas and Alberta and Saskatchewan.

Q. Now, you mentioned that you were Executive Board member of District No. 1. Was that an elective office?

A. Yes.

Q. Now, I wish you would briefly explain the organizational composition of the Executive Board.

A. The Executive Board of the International Union of Mine, Mill & Smelter Workers is a body set forth, described in the constitution of the Union. It is composed of an Executive Board member from each of the Union's Districts plus the National Officers of the Union, namely,

the President, the Vice Presidents, and the Secretary-Treasurer.

Q. Approximately how many districts does the Mine-Mill have or did it have during the time you were Executive Board member?

A. Well, at times there were eight districts. At some [fol. 603] time during that period there was an additional district, not geographical, but we referred to it as a district. I would say, by and large, there were eight basic districts in the Union.

Q. Now, you have described the organizational composition of the Executive Board. Would you briefly describe to the Jury the function of the Executive Board?

A. Well, the Executive Board was a body that was charged with administering the Union between conventions, conventions being the highest authority within the Union, the Executive Board being regarded as the body next highest in the administration of the Union, and was supposed to have met regularly to go over the problems and policies and administrative matters of the Union, approve or disapprove of what the President of the Union had done between meetings of the Executive Board. I believe in the main that explains the duties of the Executive Board.

The Court: Do you wish to have that read or something, Mr. Witt?

Mr. Witt: Yes, I missed a word or two at the very beginning.

(The reporter read the beginning of the last question.)

Mr. Witt: I have no objection. I think it should have continuity. I think he means second highest body, second highest to the convention. I think it would be clearer if he agrees to that.

The Court: If counsel wishes, he may clarify that.

Q. You mentioned this was the second highest body. What was the body that was in Mine-Mill that was higher than the Executive Board?

A. I am, of course, talking as to what the constitution intends to be the highest body and the second highest body. I was referring to the convention as the highest body as

intended by the c titution of the Union and the Executive Board as the second highest body as intended by the constitution of the Union.

Q. I would like to go back just a moment. I think you mentioned in enumerating the states in District No. 1 Colorado, is that correct?

A. The State of Colorado is a part of District No. 1.

[fol. 604] Q. And how many states—

The Court: He named the states. He said Montana, Colorado, Wyoming, and the two Dakotas.

Mr. Witt: We do not object to this if counsel wants to go ahead. We do not quite see the relevance. We think it is somewhat a waste of time, but we will see what counsel continues to go into.

Q. Mr. Mason, were you ever a member of the Communist Party?

A. Yes.

Q. And when were you a member of the Communist Party?

A. For some brief period in the early '30's.

Q. Do you know a Mr. Travis?

A. Yes.

Mr. Witt: We will stipulate that Mr. Mason knows Mr. Travis and that the Mr. Travis he knows is the same Mr. Travis that is on trial.

The Court: All right.

Q. When did you first meet Mr. Travis, Mr. Mason?

A. I first saw Mr. Travis and I believe became introduced to him in 1944.

Q. And under what circumstances did you meet him?

A. It was at a convention of the Union in Pittsburgh.

Q. Now, do you have personal knowledge that Mr. Travis was ever an officer of Mine-Mill?

A. Yes.

Q. Would you please tell the ladies and gentlemen of the Jury when and what offices Mr. Travis held in Mine-Mill?

A. Following my meeting with Travis the offices he held to the best of my knowledge were that of Acting Board member for District No. 7.

Q. When was that?

Mr. Witt: Will the witness fix the time as to each of these as he goes along?

The Court: The witness may proceed with his answers and later—

Mr. Witt: I was suggesting, your Honor, that when he makes his answer "Acting Board member" that he fix the time and so on.

[fol. 605] The Court: You can detail what positions he held, and then, if you can fix the time as you go along or later, either one, you may do so.

A. I believe he was Acting Board member sometime in 1945. That could be embracing part of '46.

Mr. Witt: Excuse me, what District? I am sorry to interrupt.

The Court: District 7 I think he said. That's correct, isn't it, Mr. Mason?

The Witness: That's correct.

The Court: Proceed.

A. The next office I believe, the next position was that of Assistant to the President, and that I believe would be in a good part of 1946. He became Vice President of the Union in '47, but part of '47 he because of a vacany in the presidency, he became President. From 1948 including 1948 until the time I left the Union he was in the office of Secretary-Treasurer. There may be some mistake in my answers, but there has been considerable turnover in the offices of the Union, and I may not have this in proper order as to time.

Q. Do you recall the passage by the Congress of the United States of the Act commonly known as the Taft-Hartley Act?

A. Yes, I do.

Q. When approximately was this Act passed?

Mr. Deikman: Objection, your Honor. This is a matter of common knowledge. It has no relevancy to the issues in this trial.

The Court: I think the dates, if it is relevant, could be

stipulated unless it has some connection with fixing a time or something.

Mr. Witt: If your Honor suggests a stipulation, we are prepared to stipulate.

The Court: If anybody knows the date.

[fol. 606] Mr. Witt: I know the date.

The Court: It is a matter of record.

Mr. Witt: We are prepared to stipulate that Taft-Hartley was passed by the Congress and was signed by the President and became effective on June 23, 1947.

The Court: All right.

Q. Immediately following the passage of the Taft-Hartley Act, Mr. Mason, did you as Executive Board member know whether or not Mine-Mill took a position with regard to whether it would or would not comply with the Act?

Mr. Witt: I object to that. The whole problem of compliance is a rather complicated legal problem. This question has as its premise a legal conclusion which at this stage of this trial would not mean very much to the Jury, and besides I do not see the relevance.

The Court: Well, I think the witness may answer. I assume it is some kind of a preliminary question, but I think the question is objectionable on the basis that you say compliance with the Taft-Hartley Act. What provision do you mean of the Taft-Hartley Act?

Mr. Crandall: I think maybe I had better rephrase the question.

The Court: I think you had better reframe the question.

Q. Immediately following the passage of the Taft-Hartley Act as a member of the Executive Board do you have knowledge whether Mine-Mill took a position with regard to complying or signing non-Communist affidavits?

Mr. Witt: I am afraid Mr. Crandall hasn't complied with the Court's suggestion if I understood it.

The Court: No, that I think is right. That limits—the first question was formed a policy with respect to compliance with the Act, and I say it should be pointed up some specific part of the Act, and I think he has done that.

[fol. 607] Mr. Witt: I do not think so.

The Court: On what basis.

Mr. Witt: Well, he hasn't said—the question of compliance, as I said, under Taft-Hartley is a rather complicated technical question legally, and there is no way in which the witness's answer to this question as put by Mr. Crandall would be intelligible to the Jury. Then, we are going to have the problem about cautionary instruction as we did on the first trial about this, your Honor, because we are getting into some pretty deep material.

The Court: No, it seems to me that the question is clear, and I will overrule your objection, and he may answer the question. The Court is assuming that the matter will be connected up some way so as to be entirely relevant here, but I assume it is preliminary.

Mr. Crandall: It is preliminary.

Mr. Witt: I do not press the point, but may I interrogate the witness on voir dire in support of my objection to the pending question?

The Court: With respect to what?

Mr. Witt: With respect to what compliance means as the word is contained in Mr. Crandall's question. I think I could develop it.

The Court: I do not see where there is any ambiguity or anything. He is simply asking him, as I understand the question, if he knows what the policy of this particular union was with respect to complying with the provisions of the Taft-Hartley Act relating to the filing of non-Communist affidavits. That is the question.

Mr. Witt: If this record has been made clear as to what is meant by complying with Taft-Hartley. Mr. Crandall didn't say affidavits in his question.

Mr. Kelley: Yes, he did.

[fol. 608] Mr. Witt: I am sorry, I missed that. It emphasizes my point. Compliance has much more to do than with the affidavit in Taft-Hartley.

The Court: I think it is a preliminary question, and I do not believe there is any reason for interrogating the witness about his complying or whatever you want to call it. He may answer the question.

A. I do.

Q. And what was that position?

Mr. Witt: May we have a continuing objection this line?
The Court: Yes, the objection may continue.

A. The position adopted was that the Union will not comply.

Q. Do you know what Mr. Travis's position as an official with Mine-Mill with regard to compliance—strike that. In connection with this position of Mine-Mill do you know whether or not Mr. Travis as an official of Mine-Mill also took a position in this connection?

Mr. Witt: I object to that on the grounds I have stated in other connections—I do not want to take too much time on it—one, on the ground of remoteness, and, two, on Constitutional grounds in light of the interpretation of Section 9(h) of Taft-Hartley by the Supreme Court in ACA vs. Douds.

The Court: The objection will be overruled, and you may answer.

A. Yes, I do.

Q. Do you have knowledge, Mr. Mason, that at some later time the Mine-Mill changed its position in this connection?

Mr. Deikman: Objection. It calls for a conclusion and opinion on the part of the witness. If some position or attitude on the part of Mine-Mill is relevant to this case, it can be shown by factual situation, what the witness observed, heard or saw, and without having to go into the witness's mind to search for a conclusion or an opinion, and it would become a matter for the Jury to determine as to [fol. 609] what the position of Mine-Mill is at any particular point. Secondly, it seems to me that what the position of Mine-Mill was on anything is not any issue in this case. It is simply whether or not the defendant is guilty of violating Section 1001.

The Court: Well, this man was an executive officer or executive officer on the Executive Board or whatever it is called of the Union which was, as he described it, the second highest governing body, and the question simply asked with respect as to the fact as to what the policy of the Union was with respect to this matter. It calls for no conclusion.

It calls for the fact of what the policy of the Union was, so, the objection will be overruled, and you may answer, Mr. Mason.

CAUTIONARY INSTRUCTION

Mr. Witt: I am sorry, if the Court please, I wasn't sure as to the point at which I should bring this to the Court's attention, but Mr. Crandall is substantially following the interrogation of the witness on direct as was followed by the prosecution in the first trial. I have the transcript of that direct examination here in my hand, and at this very point on the first trial, that is, page 558, we approached the bench and as a result of which there was a bench conference or Chambers conference, it doesn't matter, out of which eventuated an agreement between counsel that at this point a cautionary instruction be given to the Jury. So, at this point we ask—

The Court: What is the cautionary instruction?

Mr. Witt: I have it. Shall we approach the Bench?

The Court: Let me see the transcript.

Mr. Witt: I will show you the transcript. The discussion about the problem begins at page 558, and the cautionary instruction agreed upon by counsel as read by the Court in Chambers appears at pages 561 and 562, and the cautionary instruction itself given to the Jury is at page 563. I am referring your Honor to this volume opened at page 563.

Mr. Crandall: I might mention that the Government has no objection to giving the cautionary instruction at this time along the same lines.

The Court: The part you wish given is what appears on page 563, Mr. Witt?

[fol. 610] Mr. Witt: Yes, sir.

Mr. Kelley: This is a copy of what is in there if it would be of any assistance to the Court.

The Court: I will read at page 563 and a few words that run over on 564. I am going to read it verbatim as it appears in the record of the last trial when (sic) I gather, as counsel have pointed out and seem to agree, that this same question arose and it was agreed by counsel that the Court should advise the Jury, as I am about to advise you, the

transcript reads and the instruction I desire to give you at this time is: "Ladies and gentlemen of the Jury, in connection with the interrogation of the witness who is now on the stand, a matter arose which I discussed with counsel in Chambers and counsel for the Government and for the defendant have agreed I should give you this cautionary instruction at this time. I am sure you appreciate this is agreed upon by all the lawyers to the case.

"The Taft-Hartley Law, insofar as it relates to this case, provides that labor organizations which desire to utilize the facilities of the National Labor Relations Board, that is, which desire to participate in elections conducted by the Board and to file charges of unfair labor practices with the Board, must file certain documents with the Board, and that in addition, each of their officers must file the non-Communist affidavit set out in the law. Compliance or non-compliance with Taft-Hartley by the filing of these documents and affidavits is therefore optional on the part of labor organizations. Therefore, when there is testimony or evidence that Mine-Mill did not comply with Taft-Hartley or testimony or evidence that the defendant was opposed to compliance, this in and of itself does not mean that Mine-Mill or the defendant were thereby violating the law but were merely exercising the option provided by the Taft-Hartley law." You may proceed.

Q. When if ever, Mr. Mason, did this noncompliance policy of Mine-Mill change?

A. The position of the Union on the Taft-Hartley Act was changed by means of a resolution adopted at a meeting of the Executive Board of the Union.

Q. And when was this meeting of the Executive Board held?

A. In July of 1949.

[fol. 611] Q. Now, prior to the adoption of the Executive Board resolution of July, 1949, did you have an occasion to talk with Mr. Travis regarding the Taft-Hartley Act?

A. Yes.

Q. And when approximately or can you approximate the time prior to the adoption of the Act when this conversation took place?

A. Well, the last discussion with Travis concerning the Taft-Hartley Act, the last discussion before the Union's position on the Taft-Hartley Act was changed was at some time before the meeting of the Executive Board at which the position was changed.

Q. Now, would that be a matter of a week or two weeks? I am trying to fix the date in point of time.

A. I believe it was in June.

Q. Where did this discussion take place, Mr. Mason?

A. At the residence, at Travis's residence in Chicago.

Q. And who was present at that meeting?

A. In addition to Travis and myself there was Mrs. Travis in the house.

Q. Did she take part in the conversation?

A. No.

Q. Now, would you relate to the Court and the Jury the substance of this conversation connecting what was said by yourself and what was said by Travis?

Mr. Witt: If the Court please, I rise not to make an objection but just to preserve the record, because we do not know what is coming, but may we have a motion to strike the testimony about this conversation after the witness finishes this line if we think it is irrelevant or improper?

The Court: Yes.

Q. Would you continue?

A. Travis talked of the difficulties the Union was having in organizational campaigns. He said that owing to the fact the Union is not complying with the Taft-Hartley Act that the Union, of course, cannot appear on the ballot in these elections conducted by the National Labor Relations Board which certifies one union or the competing unions as bargaining agencies, "We have been losing some of these elections," he said, and that the people on the staff are quite worried about it, that there is discussions going on within the Party on this whole deal. He said, "We will soon be acting on this matter on the Executive Board."

Q. Now, you used the term in relating the substance of the conversation of the "Party". What did that term mean to you at that time?

A. The Communist Party.

[fol. 612] Mr. Witt: We move to strike the answer not only on the ground of remoteness with respect to which I believe we have a continuing objection but also because this is not evidence of membership in or affiliation with the Communist Party as of December, 1951 and December, 1952.

The Court: The motion will be denied.

Q. Did there come a time in which you talked with Mr. Travis in connection with this same motion or—strike that. Did there come a time when you talked with Mr. Travis regarding the change of policy adopted at the July, 1949, Executive Board meeting?

A. Yes.

Q. Now, could you give us the approximate time that this conversation took place?

A. That conversation was several days following the meeting of the Executive Board at which the position of the Union was changed.

Q. Now, where did the conversation take place, what city?

A. In Denver.

Q. And could you state who was present at this conversation?

A. It was a private conversation between Travis and myself.

Q. Was there any building or location or anything like that that you could point up more particularly the place of the conversation?

A. Well, it was at some one of the number of usual meeting places we had in Denver. I cannot recall which one.

Q. Now, would you please state the substance of this conversation again connecting what was said by yourself and what was said by Mr. Travis?

A. Well, I asked Travis how the changed position of the Union will affect him personally, if it means he would have to drop his office in the Union. He said that that would not be it, that it does mean, however, that he has to resign from the Party and then handed me a typewritten statement and said it was his resignation statement and will be published in the Union's paper. He wanted me to read it. He said, "I would like to have your reaction to it." He said the statement had been cleared with Ben Gold and the Party

people in New York. He wanted my reaction to it and particularly how I think the membership in my District will accept this statement when it comes out in the Union paper.

Q. Was there any further conversation in this same connection at that time, do you recall?

A. Yes.

Q. What other conversation?

A. Well, I glanced through this statement. He asked me what I thought of it. I looked over it, and I said that [fol. 613] under the circumstances I suppose it is the only thing you can do. I asked him if that would be the policy which will be pursued by Communists in other unions, and he said that was pretty much along those lines, that the Party thinks this is the best policy for us in the unions to follow.

Mr. Witt: If Mr. Crandall is done with that incident, I make the same motion to strike that I made with respect to the conversation in Chicago in June.

The Court: The motion will be denied.

Mr. Witt: I make it on the same ground.

(Document marked Government's Exhibit No. 8 for identification.)

Q. Mr. Mason, I show you a document marked for identification Government's Exhibit No. 8, and I ask you to look at page No. 3. Mr. Mason, is that the same statement that Mr. Travis showed you during your conversation that you have just referred to that took place subsequent to the July, 1949, resolution?

A. That is the same content.

OFFER IN EVIDENCE

Mr. Crandall: Your Honor, I offer page three of Government's Exhibit 8, that portion of page three captioned "Travis Statement on Signing Taft-Hartley Affidavit" with the by-line "By Maurice Travis".

The Court: All right. Is there any objection?

Mr. Witt: Yes, we do not raise any question—

Mr. Crandall: I move that the blocked-in portion at the top of the page be eliminated as well as the picture on the right.

The Court: What I am concerned about is, how was this physically handled before? You can't hand that to the Jury and have them recollect what was eliminated or something. How was it handled?

Mr. Kelley: We photostated that part which was ad-
[fol. 614] mitted in evidence, and it bears the same number as the original.

The Court: That is what had better be received in evidence if anything is.

Mr. Kelley: Mr. Witt says there is no objection to this, is that right?

The Court: What identification number does this have?

Mr. Witt: Mr. Crandall stated for the record.

Mr. Crandall: It has the same identification number.

The Court: How are we going to tell them apart?

Mr. Kelley: We substitute a photostatic copy.

Mr. Crandall: We move to substitute for the original the photostatic copy which is marked Government's Exhibit No. 8.

The Court: Is that agreeable to you?

Mr. Witt: I think it is, yes. We have another objection to its admission. We admit the authenticity, however.

The Court: All right.

Mr. Witt: We object to the introduction in evidence of this exhibit, and we move to strike the testimony that the witness has already given with respect to it on the ground that the testimony in this exhibit is not evidence bearing on the charges in this case and cannot constitutionally be evidence bearing on the charges in this case.

The Court: The objection will be overruled, and, of course, this photostatic copy will be the exhibit that is available here for use in the trial, not the paper, the photostat.

Mr. Crandall: That's correct, your Honor.

(Government's Exhibit No. 8 for identification received in evidence.)

[fol. 615] Q. Mr. Mason, I would like to direct your attention to the spring of 1952 and ask you whether or not that at about that time Mine-Mill held an official function.

A. Well, yes, there would have been meetings of the Executive Board of the Union.

Q. Now, do you recall any conversation with Mr. Travis at about that time?

A. Well, there were a number of conversations with Travis at almost every Board meeting.

Q. Could you just point up your present recollection of the first Board meeting?

A. There was one discussion with Travis that I remember.

Q. When did that take place?

A. On the occasion of one of these Executive Board meetings.

Q. And could you just give us the time when this Executive Board meeting took place?

A. I believe this one was the second Board meeting of the year. It would be about March.

Q. Where did the conversation take place, Mr. Mason?

A. At the Union's Headquarters here in Denver.

Q. Who was present at this conversation?

A. There were a number of people at the Headquarters, but the conversation was between Travis and myself.

Q. Would you please relate to the Court and to the Jury the substance of that conversation connecting statements made by yourself and statements made by Mr. Travis?

A. Travis asked me what I thought of the left-wing unions, the expelled unions forming a third federation of labor. I told him that I was opposed to it, that to begin with we had as officers of the Union promised the membership that we would seek to gain admittance for the Union with the American labor movement, seek to return the Union to the Congress of Industrial Organizations, and that we would not undertake any action to further split the labor movement in the country by forming a third federation of labor.

Q. Did he make any further comments?

Motion for Mistrial and Motion to Strike and Rulings Thereon

Mr. Witt: I move to strike that answer, and I make a motion for a mistrial on the same ground that we made it in connection with other testimony, that is, the reference to the left-wing unions in that answer, and the way this

testimony is coming in, again, we say the Jury is bound to be confused and will get to feel that the so-called left-wing unions, whichever they are, are on trial here and not Maurice Travis.

The Court: The motion to strike will be denied, and like-
[fol. 616] wise the motion for a mistrial will be overruled.

A. I said to Travis that such a third federation of labor would because of the nature of the leadership of the expelled unions stick out like a sore thumb on the American labor scene and that would be vulnerable for attacks by corporations, newspapers, and it would be attacked by the other unions in the American labor movement, and that it would be impotent as far as servicing the membership of the Union in the mines, smelters, and refineries.

He said that he goes along pretty much along the same lines. He said that the Soviet delegation in Paris at the World Federation of Trade Unions are throwing their weight around demanding that the American left-wing unions form a third federation and that this has been discussed among the boys in the other unions and that it was left up to him, Travis, to reply to Salon who is one of the heads of the World Federation of Labor Unions in Paris and to tell them that the boys in the expelled unions are not in favor of such a move.

Mr. Witt: I move to strike that answer, and I make a motion for a mistrial. It is impossible for the Jury to understand what that is all about, about a Soviet delegation in Paris. The witness has referred to expelled unions. We objected to the testimony by Eckert about the CIO proceeding against Mine-Mill. We have the same objection to this, and now the objection we think is better founded, because this witness has generalized even more about that matter, and brought in all kinds of testimony and issues which hopelessly confuse the issues in this trial.

Mr. Crandall: Before you rule on that I would like to mention that this line of questioning is not concluded, that it is actually preliminary to further questions.

The Court: I think the motion, both motions just made by Mr. Witt will be denied, and you may proceed.

Mr. Deikman: I would like to state a further ground, your Honor?

The Court: I beg your pardon?

[fol. 617] Mr. Deikman: I would like to state a further ground for that motion to strike and a motion for mistrial, and that is everything this witness has related does not add one thing to this case. If that kind of statement is taken on the part of Mr. Travis as a statement that will incriminate him with respect to issues in this court, it would be a violation, in permitting that evidence it would be a violation of the freedom of speech under the First Amendment, a violation of the right of a citizen to comment upon the issues of his time, and a violation of due process of law.

Mr. Crandall: I think that is premature at this time.

The Court: The motion will be denied. You may proceed.

Q. Mr. Mason, getting back to this conversation that you have just related to the Court and the Jury do you recall any further statement made by Mr. Travis concerning the third federation?

The Court: You mean at this conversation?

Mr. Crandall: At this particular conversation.

Q. Refer to this particular conversation.

A. I recall that asking Travis, as I often did, what was the position of the Party on this matter.

Q. And what did he reply?

A. He said—

Mr. Witt: Before he goes on with the next question I am not sure I caught what the witness said but inserted in that answer was the phrase "as I often did". I move that that be stricken.

The Court: I think it may be disregarded and the rest of it will stand.

Mr. Witt: And I ask that the Jury be instructed to disregard that remark.

The Court: "As I often did" may be disregarded, but the rest of the answer may stand.

Q. And to your query to him what did he say, Mr. Mason?

[fol. 618] A. He said the Party left it up to us and the unions.

Q. Now, I would like to direct your attention to the

year 1953 and ask you whether or not an official function was held by Mine-Mill during the early part of that year.

A. Yes.

Q. Would you please state what that function was?

A. It was a staff conference, a conference of all the elective and appointive personnel of the Union.

Q. When did this staff conference occur and in what city did it occur?

A. It was in the month of March. I don't recall the date, one week in March, and the location was here in Denver at the Albany Hotel.

Q. Now, this is your first reference to a staff conference. Would you please explain to the Court and to the Jury what the nature of this conference was?

A. Well, the elected officers, the employees of the Union, and the several departments of the Union, the field representatives, so-called International Representatives from the various Districts and even some of the office personnel or all of the office personnel were all required to meet for a period of about a week at which various discussions were gone into on various subjects, and the conference was broken into panels, these panels discussed, for example, organizational and political action, and it was a sort of a training school as it were for the people on the payroll of the International Union.

Q. Was Mr. Travis present at this conference?

A. Yes.

Q. Did you have any conversation with Mr. Travis at this conference?

A. Yes.

Q. And do you have any one particular conversation in mind?

A. Yes.

Q. And where did this conversation take place?

A. The one I had in mind took place at the headquarters of the Union.

Q. And who was present at the conversation?

A. There were a number of people at the Headquarters of the Union, but the conversation was between Travis and myself, and at one point another person.

Q. Can you name the other person?

A. It was Herman Clott.

Q. Would you please relate the substance of this conversation connecting it with what was said by each of the individuals you have mentioned?

A. Travis handed me the proposed agenda for this staff [fol. 619] conference, and in glancing through it I noticed that under the subject title of legislative program for the Union that a number of things were listed such as repeal of the McCarran Act.

Mr. Deikman: Objection, your Honor, as to what was listed in any written material. That would be hearsay.

The Court: I think he may proceed. You may continue.

A. There were items such as repeal of the McCarran Act and fight against witch-hunting and a number of items. I asked Travis if we as a union have departed so far from the principle of unionism that we are advocating as officers of the Union that this should be the program of the legislative group for the miners, smelter workers, and people in the refineries and not matters such as improved old-age pension or development of the Missouri River Valley Authority or some of the other things that a labor union should fight for. Travis said that I have a point, and he handed the agenda to one of the people in the Press and Education Department and told them to include these things I had mentioned to him, and some time later when the conversation turned to other things Herman Clott approached with the question of Travis saying that—

Mr. Deikman: Objection as to what Herman Clott said.

The Court: It was in the presence of Mr. Travis, as I understand.

Mr. Deikman: It is not subject to cross examination at this point.

The Court: He can relate any conversation that was had in the presence of the defendant.

Mr. Deikman: If it was a statement the defendant adopted or, if he kept silent it was an admission against interest, but I think in a thing like this that the United States Attorney ought to make an offer of proof, because

it sounds to me as though neither of those instances where it could be admissible has been shown, no foundation has been laid for it.

The Court: As I understand, Mr. Travis was present when this conversation took place, isn't that right?

[fol. 620] Mr. Crandall: Yes.

The Court: If he was, the objection will be overruled.

A. Clott said, "Trav, there is a duplication here. We have got the legislative program here in two places." Travis told him that this thing is dealing with other subjects, that it is all right, that the one deals with some items, the other deals with items of another type. I do not recall just what was said there. I said to Travis, "Things are getting worse by the minute. Even our legislative representative in Washington doesn't know what the legislative program for the miners and smelter workers in this Union should be." Travis said, while I had a point, let's not make too much of it, that these other things too like repeal of the McCarran Act are important, and he said, "When they get us Communists they will be after people like you if we don't get these laws repealed."

Mr. Witt: I move to strike that answer, because it is not evidence under these charges, and this kind of testimony like I think all of this witness's testimony violates the First Amendment and is not evidence because of the First Amendment under the Supreme Court decision in the Douds case.

The Court: The objection will be overruled.

Mr. Witt: While I am on my feet, your Honor, I am sorry, I didn't get clear whether this episode with Clott present was part of the same conversation the witness has already testified about with Travis about the agenda. If it is not, may we have that clarified?

The Court: I gather, I mean, if there is any question counsel better ask whether this is all one conversation.

Q. Now, you mentioned during your recital of the conversation you said later. What did you mean by "later"?

A. Well, I meant that there has been a break in the discussion on the subject.

Q. Now, what was the period of this break?

A. Oh, it would have been an hour or two later or perhaps sometime later in the day, but Mr. Clott approached us with this.

[fol. 621] Mr. Witt: I think, your Honor, your Honor has the same impression I had from the earlier testimony, that it was part of the same conversation with Travis with Clott joining it later, but, if it is clear to your Honor, I am satisfied now that he says there was a break. He talked to Travis about the proposed agenda, and then they separated, and sometime later he was talking to Travis and then Clott joined the conversation. Is that the way your Honor understands it?

The Court: I guess that is the sequence.

Mr. Crandall: That's right.

Mr. Deikman: I move to strike the entire conversation relating to the agenda. What is the possible conceivable relevance to the trial in progress now? What has this conversation regarding internal business transactions in the Union, whether certain things should be on the agenda or not, what possible relevance does that have?

The Court: I think, if you would carefully read the question, you would probably see the significance. The Court does not desire to argue the matter or stress any particular portion of the answer, because the weight to be given the testimony is for the Jury, but the objection will be overruled.

Q. Just to clear up one point, Mr. Mason, did this conversation after the break, did this take place in that same location as the previous one?

A. Yes.

Mr. Witt: I am sorry to press the point, your Honor, perhaps it is clear, but I would like to follow it so we can be prepared for cross examination. Did both of these conversations, the one with Travis alone and the one later with Travis and Clott both take place in the forenoon or both in the afternoon or both in the evening or one in the forenoon and one in the afternoon? I am sorry to press it, your Honor.

The Court: I think you can develop that.

Q. To clear the record, Mr. Mason, during the first conversation that you mentioned between yourself and Travis was Mr. Clott present at that time?

[fol. 622] The Court: No, well, you can ask him that, but I gather he already testified he wasn't. But what counsel is inquiring about is what time of the day did these conversations take place.

Mr. Crandall: I think the record is clear on that, but I will clear it up.

Q. The first conversation between you and Mr. Travis on this specific date or time that you have related, when did that take place?

A. It would be sometime during either recess of a session of the Executive Board or a break for lunch period or just before we convened in the morning. I can't recall, but I do recall there was some time elapsed between the conversation between Travis and myself and then later Clott's approach.

Mr. Witt: I think the witness may have misspoken himself. I could be wrong. I think the record could be more clear.

Mr. Crandall: I didn't get it.

Mr. Witt: May I suggest to Mr. Crandall off the record what I think the situation is?

The Court: All right.

Q. Just to clear the record on this point, did this conversation take place at a meeting of the Executive Board or was it at—or just tell where the conversation took place.

A. The conversation took place at the headquarters of the Union.

Mr. Witt: I am sorry, may I suggest that Mr. Crandall make it more clear? I think I am right now.

The Court: I thought it was—I may be wrong along with the rest of them—I thought this was a conversation during the period when they were having the staff meeting.

Mr. Witt: That is my point. He testified the staff meet-

ing took place at the Albany Hotel and the one with Travis alone and the one with Travis and Clott took place at the Headquarters of the Union, to use the witness's language, so, I was right when the witness referred to meetings of [fol. 623] the Executive Board, and that is what I was suggesting that Mr. Crandall clarify.

The Court: You may proceed.

Q. I would like to direct your attention, Mr. Mason, to the period in approximately July, 1953. Do you have any recollection of having a conversation with Mr. Travis at that time?

A. Yes.

Q. And would you please state where this conversation took place?

A. The conversation I have in mind took place, there was a telephone conversation.

Q. Who initiated the telephone conversation?

A. I did.

Q. And when approximately did this telephone conversation take place?

A. Late in July, I cannot recall the dates, it may be possible that it could have been early in August too. As I recall, it was late in July.

Q. That is 1953?

A. Yes.

Q. Now, would you relate to the Court and to the Jury the substance of this conversation connecting it with what was said by Mr. Travis and what was said by yourself?

A. I told Travis to call off the Party watchdogs or there would be trouble. He wanted to know what is wrong. I told him that he knew damn well what was wrong, that we were in the midst of extreme bargaining difficulties and that he and his people chose this time to start distorting the facts involved in the Montana bargaining and blackening our name before the membership elsewhere throughout the Union, that, if he doesn't call off this dirty attack, that there is going to be trouble. I was quite angry. I told him that I had been invited to testify against him and that I declined to do so but the way I feel now that I should have said yes to the invitation to testify against him. He said

that, "You would not do that, would you? We have always been able to work things out together. Don't do anything. I will come up to Montana, I will fly up, and we will sit down and talk this thing over. We have been able to talk things over before. Don't do anything until I get up there." In substance that is the conversation.

Mr. Deikman: I move to strike that conversation, your Honor, because it mainly was a speech on the part of Mr. Mason in which approximately three words were spoken by the defendant in a 15-minute speech by Mr. Mason which I assume he is reducing here, and, furthermore, it could [fol. 624] not possibly be evidence against Mr. Travis on the charges of 1951 and '52, membership or affiliation in the Communist Party, and it violates, again, the principles of the First Amendment if this is to be used as evidence in a trial of this nature.

The Court: Well, as I understand, it was testimony as to a conversation between this witness and the defendant. Of course, if it is relevant, naturally, that would make it admissible and remove it from any of the objections you have just indicated, and I think its relevancy appears on the face of it. You may draw one inference, and somebody else may draw another, but the question of inferences to be drawn is a question, of course, for the Jury. The objection will be overruled.

Q. As a result of this telephone conversation did you have a subsequent conversation with Mr. Travis?

A. Yes.

Q. And in point of time—

Mr. Witt: Excuse me, your Honor. Since Mr. Crandall is going into another topic, were you planning to recess about this time?

(A recess was taken.)

WILLIAM MASON, resumed the stand, and testified as follows:

Direct examination (continued).

By Mr. Crandall:

Q. Just prior to the recess I believe you had just finished with the conversation, telephone conversation or the subject of a telephone conversation with Mr. Travis that took place in late July or early August, 1953. Now, I would like to ask you as a result of that telephone conversation did you have a subsequent conversation with Mr. Travis?

A. Yes.

Q. And when did this conversation take place?

A. A few days after the telephone conversation.

Q. Where did it take place?

A. In Butte.

Q. Now, just for the record and clearing this point up am I correct in stating that that would be in the early part of August, 1953?

A. Yes.

[fol. 625] Mr. Witt: I didn't object to it, but may I suggest that counsel not lead the witness? All of these are important details, and we should get the testimony of the witness.

The Court: I think the question is very leading and fixed the date.

Mr. Crandall: I was clearing this up for the jury because we have had a recess.

The Court: Has there been testimony fixing the date?

Mr. Crandall: I stand corrected.

Mr. Witt: I don't think anybody at the prosecution table should talk out loud on this, but that is not important. It will take time to clear up what the witness said as to when the telephone conversation was and when the subsequent meeting was.

Mr. Crandall: I think it is cleared up now.

The Court: You are the one that fixed the dates, and the question counsel is raising has this witness ever fixed the date?

Mr. Crandall: I am sorry.

Q. Will you state when the telephone conversation took place, Mr. Mason?

A. I already stated that to the best of my recollection it was late in July. It is entirely possible it may have been very early in August. I don't know the date.

Q. Then the conversation that resulted from this conversation when did that take place?

A. I testified that was a few days following the telephone conversation, and, again, I don't recall the date or the number of days. I would place it within a week.

Q. Who was present at this subsequent conversation?

A. During the early part of the meeting with Travis John Clark, the President of the Union, was present. However, not during the conversation with Travis on matters involved, bearing on the telephone call.

Q. What city did this conversation take place?

[fol. 626] The Court: Fix the place.

Mr. Witt: The witness said Butte, but can we have where in Butte?

Q. Where in Butte did this conversation with Travis take place?

A. The part in which John Clark participated was at the Grand Hotel, but the conversation, private conversation between Travis and myself took place at the Hotel Leggat in the bar.

Q. Would you relate to the Court and to the jury the substance of the conversation that took place at the Leggat Bar and connect it as to what you said and what Mr. Travis said?

A. Travis said that, "Now that we have gotten rid of Clark let's down to business. What is the situation?" I told him that he knew very well what the situation was and that in all my experience in bargaining we have the most difficult year of bargaining with Anaconda and that I considered it very dirty on his part and on the part of his people to attack us in the midst of our bargaining difficulties with the Anaconda Company, that we understand it for what it is, that it is an effort by him and his people to undermine the leadership of District No. 1 and to place

it in a bad light before the membership of the entire union, we know that this is so because we are opposed to the Party, the Communist control in this union, and he said he had been misinformed as to the facts in bargaining and that it was Clark who gave him the wrong information, that he is sorry if the facts have been distorted by some of the staff people in the union.

I said that I do not believe that Clark gave him the wrong information, that Clark, himself is involved in the Montana bargaining and would as a result not want the Union misinformed as to issues involved, that I think his commissars, Travis's commissars on his staff, on my staff are the ones that gave him the wrong information.

Mr. Deikman: I move to strike all that.

The Court: Has he finished his answer?

Mr. Crandall: No, he hasn't finished the answer.

[fol. 627] Mr. Deikman: I understood he finished it.

A. He said, Travis said, now that the facts are clear I should not worry, there will be no more attacks but as to the other things that I talked about and we have talked about before that he would like to take these matters up, my position on things with Al Pezzati and the boys in Denver. He asked if I would come to Denver a day or two in advance of a wage policy conference that had been previously scheduled, he asked if I would sit down with him and the boys and talk things over, that we may be able to work things out, we did before, we have always been able to get together.

I told him that I doubt whether anything would be accomplished in such a meeting, that I am talking to him as the leader of the Party for he is in the Union and that what has happened so far has made some of our people in Montana among them the men who built the Union very angry at the situation. He asked me if, he said, "How would you people in Montana feel if I stepped out of the office of Secretary-Treasurer and somebody like Al Pezzati got into the office?" I told him that we have nothing against him personally, that we are opposed to him only as a representative of the Party, and in my own opinion, if Al Pezzati got into the office, the position of the Communist

Party would be enhanced within the Union because Pezzati was a fresher man and not as well known in the Union. I said to him that we have never opposed him on a personal basis, that, as a matter of fact, we can say that in all the other things we have been able to get along with him very nicely in the question of allocation of organizers and allocation of funds and regular trade union policies but we are opposed to Communist control of the Union. He said that he was very happy that we didn't have anything against him personally.

Q. Now, as a result of this—

Mr. Deikman: If this conversation is to stand as being relevant, then this man is going to be tried for the speeches that this man made.

The Court: Point out why it is not relevant.

Mr. Deikman: Because there is nothing in the way of admissions against interest in the way of anything that would identify Travis as a member of the Communist [fol. 628] Party, and even in that period which is remote from the time that we are talking about in this indictment, nothing that he said would so much as hint that he was a member of the Communist Party but only that this man believed him to be a member of the Communist Party. Therefore, the only evidence we have here is a tirade on the part of this witness.

The Court: I don't agree with that, and there is nothing in the record to support that. He is testifying to what the conversation was. This is no voluntary statement. He is testifying to what was said in this particular conversation.

Mr. Deikman: I will make it very short. We make our objection on the same ground we have made previous objections and also that, if we were to cross-examine this man on the basis of this conversation, all the irrelevant material that has been put in on the basis of this supposed conversation, we will be here endlessly, because he has gone into the entire history of the Union. He said that the Butte Local built the Union which does not happen to be our interpretation of the facts, but we would have to go into that kind of history if we cross-examine him.

The Court: He is stating I again reiterate simply the conversation and the statements he made and that Mr. Travis made, and it is for the Jury to infer with respect to Mr. Travis's association with the Communist Party which is one of the primary issues in this case. The witness has testified to the conversation in which he directly charged that the difficulty in his area was due to the fact that the Communist people whom he charged Mr. Travis with being his people or something to that effect were interfering with the Union operations and requesting some relief from that angle, and the jury have heard what the witness said to Mr. Travis, and they have heard Mr. Travis's reply, and it is for the jury to ascertain what inferences can be drawn from the testimony, so, the objection will be overruled.

MOTION FOR MISTRIAL AND DENIAL THEREOF

Mr. Witt: I respectfully move for a mistrial on the ground that your Honor hasn't correctly summarized the witness's testimony, and in view of the fact that I think that some of your Honor's remarks are highly prejudicial and improper I make this motion for mistrial.

[fol. 629] The Court: Well, the motion will be denied. I will tell the jury that under the law, as I told you at the beginning of the case, you are the sole judges of the credibility of the witnesses and the weight to be given the evidence in the case, and you should pay no attention to the Court's appraisal of the facts in the case, and, if there is anything the Court has said along that line, you should disregard it entirely in arriving at your verdict. Counsel have repeatedly been making objections to the irrelevancy of the testimony. The Court has been refraining from commenting on the possible inferences that might be drawn, but the objections continued, and the Court felt it proper that the Court point out why it was relevant, but you are not to pay any attention to the appraisal of the evidence by the Court or be bound in any way by the Court's view of the evidence, because you are the sole judges of the credibility of the witnesses and the weight to be given the evidence.

Q. In this conversation that you have just related you made reference to invitation to meet with Mr. Travis in Denver. Did you at some later time meet with him concerning the subject matter that you have just discussed?

A. Yes, I do, yes, I did.

Q. And when did that meeting with him take place?

A. Well, it was immediately after the Wage Policy Conference in Denver, perhaps a session or two of the Executive Board.

Q. Where did this wage policy conference occur?

A. Here in Denver.

Q. When did it occur?

A. I am not at the moment able to recall the date.

Q. Can you give us the month of the year?

A. Well, it would be a matter of some days following the conversation in Butte. I can't place the date at the moment.

Mr. Witt: I am not pressing it, your Honor, but can he place the month? I am suggesting to Mr. Crandall whether he can place the month. I assume it is in 1953.

The Court: I think that is what he is trying to do. If the witness can place the month, he may do so. You may inquire, Mr. Crandall.

Q. You mentioned that the conversation at the Leggat [fol. 630] Bar took place in August. Can you give us the month when this occurred to the best of your recollection?

A. Yes.

Mr. Witt: I don't think Mr. Crandall is accurately representing the record. I gather that Mr. Kelley agrees with me.

Mr. Kelley: Not at all.

Mr. Witt: I am sorry. I don't think the record will show—I could be mistaken—I don't think the record will show that he placed the conversation in the Hotel Leggat Bar in Butte in August.

Mr. Crandall: I think the record will show that.

Mr. Witt: I won't press it. What the record shows the record shows. May I press the suggestion that the witness be asked to fix the month of the conversation in Denver?

Q. I will pose this question to you, Mr. Mason: In reference to the conversation that took place in the Leggat Bar how long after this did this conversation take place?

A. Well, I said, I testified that it is a matter of some days, as far as the month is concerned it would be August, of course, 1953.

Q. Now, where did this conversation take place in Denver if you have knowledge of such fact?

A. Part of it at the Sears Hotel and most of it at a restaurant on Broadway here in Denver.

Q. Who was present at the conversation?

The Court: There are two conversations?

Q. Who was present at the first conversation at the Sears Hotel?

Mr. Witt: If anyone.

Q. If anyone.

Mr. Witt: When he says that Mr. Crandall means anybody else.

A. Travis and I.

[fol. 631] Q. Now, would you relate to the Court and to the jury the substance of the conversation that took place at the Sears Hotel connecting it with what Mr. Travis said and what you said?

A. It was one conversation but part of it was in one place, part of it in another.

Q. Then, am I correct to say that this is a continuing conversation?

A. Yes.

Q. Would you then relate—

The Court: What does he mean by that? Do they continually talk as they walk or what? You had better treat it as two conversations unless it is a continual conversation.

Mr. Crandall: I thought I did, your Honor.

Q. Would you please explain the circumstances surrounding this conversation to clear up as to whether it was more than one conversation?

A. It was one conversation, but the discussions started at the Sears Hotel continuing en route to the restaurant where we had dinner. The bulk of the discussion, as a matter of fact, all of the discussion that bears on the subjects discussed over the telephone and in the Hotel Leggat Bar, but the conversation took place in the restaurant on Broadway.

Q. Now, would you relate to the Court and to the jury the substance of the conversation that took place in the restaurant as it related to the Leggat Bar conversation connecting it with what Mr. Travis said and what you said?

A. This was a very lengthy conversation. I told Travis that in my opinion there is a serious crisis developing in the Union, that the opposition to the Party line is increasing, that it exists not only in Montana but throughout the Union. I told him that here is the leader of the Party forces should come forth, take some action to educate the membership that there is room in the Union's leadership for non-Communists as well as Communists, that in filling vacancies and appointing the international representatives, miners and smelter workers and refineries workers from the rank and file will be chosen and not Party liners from outside the Union, that the policy of the official organ of the International Union, the paper, which has been constantly criticizing and attacking the foreign policies of the United States and not once criticizing the position of Soviet Union, that that should be changed, that the paper must reflect more the thinking, the aspirations and aims of the rank and file membership, [fol. 632] that the constitutional violations should be ceased and that the Union be operated under the constitution, a number of other points I listed which I told him are essential in order to avoid a crisis within this Union.

I said to him that it is a shame and a bad reflection on him and on his people that there is now a new opposition in the Union to Communist control after on two previous occasions such anti-Communist opposition had withdrawn as individuals and as local unions from the organization, and according to everything that is right the Union should now be free of any opposition, free of any dissen-

sion over the question but the opposition exists throughout the Union.

Travis told me that these things that I am outlining are in direct opposition to the Party and that I am not being realistic if I think that he, Travis can change the policies of the paper. He said that he had had a talk with Pezatti, Stern, and the boys about the things we discussed in Butte, about my position and they are not in favor of making any deals, that he knows I have been fighting the Party, and that Al and the boys know it too. I told him that I was not here to make any deals, that I am not concerned for my personal position within the Union, that I have always been elected and as a matter of fact I was perhaps the only one originally elected by the workers in the Union but that I would not like to go through a new term of two years sitting on the Board unless some of these things are changed, that as far as I am concerned I understand his attitude to be that he does not want any unity and that to me that means a fight, and, if he wants to fight it out, it is all right by me, the fight against Communist control will have to be undertaken in this Union sooner or later anyhow.

He said that Pezatti and the boys feel that there should be no compromises and that he, Travis, is one of those in the Party who thinks that there have been too many compromises already, that I do not grasp the new situation, that the Soviet Union is becoming stronger, and that the position of the Communist in the Union has been stronger, we have been able to he said repulse the raid and hold this union and other unions. I told him that in facing the problems of the Union the Union became expelled from the labor movement, and in fighting off the raid on the Union's membership he had people like my brother Joe and myself and others who worked to build this Union long [fol. 633] before he, Travis, was in the Union, and that in a fight which I suppose will have to take place between us and you people in control of the Union we oldtimers will choose the ground on which we will fight, we won't fight on the issues that they select, we are going to expose the Party control of this organization and throw the thing in the open.

He said that in such a fight, and, as I admit myself, he has the machine and the paper, that these people are seasoned fighters, and that he had an opportunity to watch my boys in action, he will not get much help from them, the only one qualified to help them in such a fight would be my brother and they understand that he has some personal problems now and he will not be of much help to them. He said that he does not think that I am the kind of a person that would split the Union. I said that I certainly do not like to see a split in this organization which has already been split a number of times over the Communist issues, but that I consider it an insult to the old-timers in the Union that I represent and to myself and to my dignity to be forced into a position where I have to negotiate with him, Travis, and the Party people in control of this Union for merely the restoration of the rights and privileges of members and local unions and of the democratic processes which our predecessors in the Union have established and which we, the members, have enjoyed down through the years and which were taken away from us, and that as far as I am concerned I am disposed to fight especially in view of his attitude and the attitude as he reported of Pezatti and his boys.

He said, "You and Joe were invited to get into the Party, had you done so, you would be sitting high in the councils of this organization with us, but you failed to do so."

Q. Do you recall anything else?

A. At the moment I don't recall. It was a very lengthy conversation, and I know that much more was said.

Mr. Witt: If the Court please, we move to strike that answer, and there are so many grounds plus several grounds we have discussed in Chambers outside of the hearing of the jury that I am wondering—

The Court: You can renew the motion to strike in [fol. 634] Chambers rather than to have a recess now. The motion will be held under advisement until you can argue further.

Mr. Witt: Can we go in Chambers?

Mr. Crandall: We will be finished very shortly.

Mr. Witt: May we go in chambers as soon as Mr.

Crandall is done with his direct examination which I gather he will be in just a minute?

The Court: Yes.

Q. During this same year that you have just related this conversation was there an election of the Executive Board members?

Mr. Witt: I object to that. There is no relevance in this case.

Mr. Crandall: I merely want to establish that he was on the Executive Board at that time.

Mr. Witt: We will stipulate if Mr. Crandall thinks it is important. Mason was elected Executive Board member in 1953.

Q. And did you serve out your term, Mr. Mason?

A. No.

Q. And what was the period for which you were elected?

A. I was elected for the year 1954 and '55.

Q. And subsequent to this conversation with Mr. Travis do you recall any further private conversations?

A. None private. They were all public fights.

Mr. Crandall: We pass the witness.

The Court: Are you through with your direct examination?

Mr. Kelley: That completes the direct examination, your Honor.

Mr. Witt: May I interrupt? I want to be sure that we get our objection on the record—our motion on the record as to Section 3500.

[fol. 635] The Court: Make your motion now.

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VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 10

MAURICE E. TRAVIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 16, 1959
CERTIORARI GRANTED MAY 31, 1960

SUPREME COURT OF THE UNITED STATES

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MOTION FOR PRODUCTION OF STATEMENTS AND FOR PRODUCTION OF GRAND JURY MINUTES AND RULING THEREON

Mr. Witt: At this time we make the same motion as we made in the case of the witness Eckert and the witness Gardner under Section 3500 of the Criminal Code and with respect to any grand jury testimony which this witness may have given.

The Court: Of course, the motion with respect to the grand jury matter will be denied now subject to your leave to represent the matter, but the motion with respect to 3500 will be considered. And what is the position of the Government about that?

Mr. Kelley: I respectfully state to your Honor that we have nothing that is wholly relevant to the testimony of the witness on direct examination, but we do have a number of documents to present to the Court in camera.

The Court: In other words, you are taking the position that you have nothing to submit without first submitting it to the Court?

Mr. Kelley: That's correct, your Honor.

The Court: Are the matters that you desire to submit to the Court under 3500 available?

Mr. Kelley: They are available, your Honor, and I would say to you that we will have them down to you by the time that you have completed your examination of the documents pertaining to the previous witness.

The Court: Sometime tomorrow they will be available?

Mr. Kelley: Yes.

The Court: I wanted to know they are available. All right, we will proceed on that basis. Of course, the defense will not be in position to cross-examine until they have ascertained what is furnished under 3500.

Mr. Witt: If the Court please, may we approach the Bench for a moment before your Honor talks to the Jury about the recess?

[fol. 636] The Court: Yes.

(Conference at the Bench.)

In Chambers

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: What is to be mentioned now?

Mr. Kelley: Your Honor, I would like to make a record. First, I want to hand you two of the reports relating to the witness Gardner and would like to make this statement for the record. This is in the nature of preliminary to making any request of the Court. It probably will sound argumentative, which it is, but it is preliminary to a request that I want to get into the record. If 18 USC 3500 is to be interpreted in the light of the Jencks decision, it might be well to look at the factual situation which to (sic) Justice Brennan called for the conclusion which the Court reached. It should be borne in mind there were other witnesses in the Jencks trial who were not paid informants and that the Court did not dwell on failure to furnish any reports they might have made.

The Court pointed out that Matusow and Ford "were Communist Party members paid by the Federal Bureau of Investigation contemporaneously to make oral or written reports of Communist Party activities in which they participated."

I want to point out particularly that they were to make contemporaneously oral and written reports of their activities. And then the opinion goes on, "They made such reports to the FBI of activities allegedly participated in by the petitioner, about which they testified on the trial."

It is significant that the Court noted that Ford, "became a paid undercover agent for the FBI and reported regularly upon Party activities and meetings." The Court noted that from 1948 through '53 Ford had been paid $7,025.00 for his services. Later the Court pointed out that Matusow "was a paid undercover agent for the FBI before he went to New Mexico."

The trial court denied a request for the production of their reports, and the Supreme Court held that to be error, and they held, one of their holdings was, "That the petitioner was not required to lay a preliminary foundation of [fol. 637] inconsistency because a sufficient foundation was established by the testimony of Matusow and Ford that

their reports were of the events and activities related to their testimony."

The defendant does not now have to lay any foundation under Section 3500, but the Court has to determine what portion of the documents produced by the Government amount to the witness's "reports * * * of the events and activities related to" his testimony. The Jencks decision again talks about "their reports".

The type of investigative report submitted here, which I have handed to the Court does not purport to be a report of the witness. It is not substantially verbatim, it is not contemporaneously recorded, and I point out one of these was approximately 30 days from the time of the contact by the agent with the witness, and it has not been signed or in any manner adopted by the witness.

In addition to holding that no foundation was required for production the Court held in the Jencks case that the Government should produce "all reports of Matusow and Ford in its possession, written, and when orally made, as recorded by the FBI, touching the events and activities as to which they testified at the trial."

It is apparent to me that Congress correctly interpreted the significance and purport of the Jencks decision in Section 3500. The terms of the statute simply clarified the language of the opinion. To be producible the statement if written must be that of the witness either signed or adopted in some other manner by him. If it is oral, the statement must be "a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of an oral statement.

In view of the foregoing the Government respectfully requests the Court to reconsider the application of 3500 to the documents submitted and advise us whether or not the prior deletions are all that the Court feels should be deleted under Section 3500.

The Court: Well, I gather what you are saying is that [fol. 638] in the statement produced by you pursuant to the defendant's motion that there are certain items which are stated in the papers you submitted as being statement by the witness Gardner to an FBI Agent, and I gather

what you are saying is that you think that that should be excised because it doesn't come within the definition of the statement in 3500. Is that what you are saying?

Mr. Kelley: Well, that is partly in it. In addition, I am saying there is information in there which does not fall within the definition of "statement" which could very well be the statement of the agent rather than that of the witness, and, further—

The Court: Well, on that phase the Court agrees with that part of it, and I didn't think in my determination of what was to be excised that I included anything that was a statement of the agent or conclusion of the agent. What I attempted to cover and say should be produced were statements made to the agent by the witness. Now, if there is anything included, I haven't seen, of course, what the mechanical reproduction results of what I indicated on these slips that I fastened on there would be, but I don't recall anything like that.

On this other business I want to point out that under 3500 I don't see any contemplation in here of the Court's determination after you have submitted the matters as statements of whether they are statements or not. It is the Court's sole duty under 3500 where you have produced the material to simply excise the portions of said statement which do not relate to the subject matter of the testimony of the witness.

In other words, let's go over the section. As I understand it again, I have got it right here before me, Subdivision (b) is the one we are concerned with to start with, there is nothing here that has anything to do with that. It says, "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."

That is the order that has been made in this case in the [fol. 639] first instance. Then omitting the second sentence of Subdivision (b), Subdivision (c) says, "If the United States claims that any statement ordered to be produced under this section—" those are the ones you tender as being within the category and within the definition of

"statement" as defined in the statute, "If the United States claims that any statement ordered to be produced—" again, that is the ones you proffer—" under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness."

In other words, I apprehend or understand under Section 3500 that after the Government has produced the material, given it to the Court that the Court's sole duty then and sole function is to excise the portions of such statement which do not relate to the subject matter of the testimony and that the Court then, the Government having in the first instance produced this matter and as statements, is not required to determine in camera whether it does constitute a statement under Subdivision (e) of 3500, because the reports would indicate just as the matter we are talking about and as some excerpts furnished with respect to this first witness Eckert, so, it is simply a recital that the witness stated as follows to the FBI.

Now, by the fact that the Government produced the report and the statement I think it possibly could be assumed that it came within the definition of "statement" and that the Government more or less conceded that it came in the definition of "statement", because there is no way of knowing whether the witness read it over after it was written or it was reported contemporaneously or anything else from the face of the report. The moment the Government says, "Here are statements made by this witness but we contend that part of them should not be given to the defendant because they do not relate to the subject matter of the testimony of the witness," why, that is the sole function of the jury. The matter of what is produced in the first instance is based on the direction of the Court to start with. "* * * the court shall order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."

[fol. 640] What is produced in the first instance is a matter that you determine. Then, if you say, "Well, here is the statement all right, but we think in the statement are matters that I have said that are not the subject matter of the testimony of the witness on direct, we want the Court to determine what portion should be excised," then that is the Court's duty, because these other matters of whether that was made contemporaneously, whether he otherwise adopted or approved it, those things are going to the United States. So, with respect to this particular witness here and with respect to these particular documents, and those are the only ones that have been handed to me, I do not believe that the Court can go into the question of whether they are statements, because you have branded them as such by the very fact of producing them. That is what seems to me to be the case.

Mr. Kelley: Well, your Honor, I see what is creating our problem. We have taken a slightly different view of the approach to it than the Court has. I think probably the Court is right on it. We have produced things that we do not think were statements either oral or written of the witness, and Mr. Witt pointed out one the other day that was an inter-office telegram which he pointed out to us would not come within 3500.

Mr. Witt: I have changed my mind on that since. I want the record to show that I now think I was wrong.

The Court: That is water under the bridge, because I produced that. But I am inclined to think and I might add just categorically in this group I do not think there is anything that comes in that category, but I, myself, at the moment feel that that was probably—that it wasn't within this category, but, as I say, the thing I believe is just what I have stated here, that when they are submitted that the Court's sole duty under 3500 is to excise the part that is not relevant in effect, and, not to go into the question, because when the Government produces them they know in effect these are statements, and I think that is what they have been called, and the statute expressly says as hereinafter defined.

Now, these matters that we are talking about, as I reiterate, are just statements by the agent that whatever the witness's name is stated the agent so and so and re-

cites some matters, of course, which obviously I expect [fol. 641] would be assumed to be written by the agent. On the other hand, under this definition, if they were adopted or approved by the witness, or, if they were verbatim statements written out in longhand right at the time contemporaneously they would come within. Those things are within the Government's knowledge, and when they produce the statement I don't think I can go back of that. The initial problem is on you as to what you produce in the first place I expect.

Mr. Kelley: Well, I think that clears up our problem. I would not be positive, but it is my recollection that we have submitted these as documents relating in part to the testimony of the witness on direct; it wasn't our thought that they constituted statements.

The Court: Let's get the record clear on that. I don't think that is the way the record is, and I don't think there is anything in the statute that places on the Court in camera an obligation to determine whether it is a statement or isn't a statement. I think what they demanded, and I think the record will show it, is that the statements they claim were made by the witness, they have made the demand under 3500, and then when the demand is made as this statute says the Court orders you to produce any statement as hereinafter defined of the witness in the possession of the United States. That is what the order was. Then you get up and say, "Here are the statements that we have. We contend that a portion of these statements do not relate to the subject matter of the testimony of the witness and wish the Court to examine them and determine what portions are to be excised. That is the philosophy of the statute. It is not to get into a determination, there is no basis for the Court to make the determination you are talking about.

Mr. Kelley: Well, of course, there might be an argument as to what is contemporaneously made. That is like reasonable time and those things, and whether that was intended to be left to the discretion of the Government or to the Court is a problem that this statute presents, and whether it is substantially verbatim is in the same category, and those are problems which we have been struggling with on this thing and trying to work within the statute and

within the spirit of it, why we have produced many things which we felt did not come within the purview of the statute, so, it may be that we should reappraise our approach.

[fol. 642] The Court: I think from here on you had better consider what you want to do before that. That problem isn't before us. You haven't produced anything on this last witness—what is his name?

Mr. Kelley: Mason.

The Court: You haven't given me anything but on this Gardner business I think those were produced in the circumstances I just indicated, and I think that the part I have marked here of these statements that you are apparently objecting to was just a recital that Gardner stated to agents such and such. I think they should remain in.

Mr. Kelley: Well, may I or should I interpret that remark as saying that as the record now stands and as your order now stands that we produce according to the previous—

The Court: According to this memorandum I have made, and that has just this little one exception to it. I made it as carefully as I could, made the notations, but I haven't seen the results transposed into the photostats produced. Now, you said a moment ago that, you said included in the matter I said should be given them were some matters that were purely and wholly the statements of an agent, not the witness, of an agent. Now, if that is a fact, I think probably I should—I think probably I just made a mistake, but personally I don't think it is a fact, but it will develop by my looking at the record again. Subject to that exception I think you should give them the part I have indicated.

Mr. Kelley: We are ready to comply with the Court's order, but I think this has been a very helpful discussion as far as I personally am concerned in trying to understand the operation of this Section.

The Court: I think it is something you had better think about yourself before this next one is produced. When can you give them the material on Gardner?

Mr. Witt: It is of the utmost importance to us that we

be given an opportunity to make our record on this whole procedure before you go on to other problems.

The Court: Well, I am just asking them when they can get them.

[fol. 643] Mr. Witt: Before we leave what you and Mr. Kelley were discussing most of which we are not privy to we did want to make a record, and we think it is quite important.

The Court: All right.

Mr. Witt: But aside from saying now that we object to this entire procedure that the Court and the prosecution have been following may we confer for a moment or two before we make our record on this problem?

The Court: Yes.

Mr. Witt: If the Court please, we are not disposed to take your time to argue these objections we make that I am about to make. All we want to do is state them for the record to preserve our record. First, we object again to the procedure that is being pursued. We object to it whether your Honor believes it is authorized by 3500 or not. The other day we said we object to the procedure if authorized by 3500 because it violates due process in the sense that the Court and the prosecution is discussing evidence or material that is vital to our right of defense and vital to our right of cross examination and the defense is not privy to the discussion or the defense has no idea as to what is going on between the Court and the prosecution and what material, statements or otherwise that the Court and the prosecution are discussing.

In that sense especially in view of what Mr. Kelley had to say this morning it is our view now that the procedure that is being pursued is an improper interpretation of 3500, but, if, however, we are wrong about that and the procedure which is being pursued does conform to requirements of 3500, we say that 3500 denies due process and the right to the defendant to a fair trial and also especially in the light of what Mr. Kelley said this morning violates the doctrine of separation of powers, and that according to what Mr. Kelley has said as he reads 3500 it is the responsibility of the prosecution to make the decision in the first place as to what should be produced for the defense and what should

not be produced for the defense and what the defense should say and what the defense should not say.

Now, going next to that point aside from the constitutional issues and getting back to our view of the procedure [fol. 644] under 3500 we say that in that respect we have not called attention to the procedure that has been violating 3500. As we read 3500 once we make our motion for production the prosecution is required to produce directly for the defense without producing first for the Court whatever is in the possession of the prosecution to which the defense is entitled under 3500.

Now, with respect to the witness Eckert and now with respect to the witness Gardner the prosecution has been turning over nothing directly to the defense. First, everything that is turned over is turned over first to the Court. It is clear to us from the material we got pursuant to the order of the Court relating to the witness Eckert that all, at least most of that material constitutes statement as defined in 3500, and, therefore, there is no question but that that material should have been turned over to the defense directly without being routed to the Court.

Beyond that we strenuously object for the reasons we have stated and for additional reasons to the prosecution's, to begin with, deciding even what should be turned over to the Court in order to determine not what is relevant or irrelevant contained in documents which are otherwise statements but in order, to begin with, what are statements. For example, under the most extreme illustration in what Mr. Kelley had to say Mr. Kelley referred to the problems posed by the word "contemporaneously" in the definition of statement in 3500, and we raise the question as to whether or not a document, which was reported by an agent after the witness orally told the agent what the agent later reported in the document he raised a problem with respect to that as to whether that document was contemporaneously recorded.

Now, we object to the prosecution's making those decisions without the defense being privy to them and more seriously without even the Court's being privy to them. It is our position, and, if we followed the Court this morning, we think the Court is inclined to agree with us, but I am

not sure, it is our position that once the prosecution determines that the particular document relates to the subject matter of the witness's testimony then the documents should be turned over either directly to the defense assuming they contain no irrelevant material, or, if the prosecution believes they do contain irrelevant material, then to turn them over to the Court.

[fol. 645] If Mr. Kelley's interpretation is correct, it can be that 99 percent of the documentary material in the possession of the prosecution would never be disclosed to the Court let alone to the defense and especially in view of the terribly burdensome task of examining these witnesses in chambers about the statements they have made to agents of the Government, the almost insuperable task in achieving our objective. We think that procedure whereby the prosecution determines that it won't turn over documents in the first place is peculiarly vicious. I do not use the word in any personal sense but in the sense of emphasizing our very, very strong objection to it, and we think that violates the intent and purpose of 3500, and, if it doesn't, it certainly violates our right to a fair trial and flies squarely in the face of Jencks.

On that as to Jencks I disagree with what Mr. Kelley had to say about the meaning of that opinion. It is true that the Court used the language that Mr. Kelley quoted, but it used it in the context of the facts in that case. And, specifically, as I see it on the subject, it does not make the slightest bit of difference whether the witness was an informer in the pay of the FBI at the time the reports or statements were made or whether he is a person who wasn't in the employ of the FBI at the time he made his statements.

The Court: I think we will go along the line I have stated. I think the statement you just made is consistent with the position that you have taken right along with respect to this matter. When will the Government be able to furnish the actual material that goes to the defense on this Gardner case?

* * * * * * *

[fol. 656] In Open Court

FRED GARDNER, resumed the stand, and testified:

Cross examination.

By Mr. Witt:

Q. Mr. Gardner, will you tell us when and where you were born?

A. I was born in Galena, South Dakota, July 13, 1906.

Q. Mr. Gardner, you have given testimony as a witness for the Government in other proceedings, haven't you?

A. Yes.

Q. Will you tell us in which proceedings before this one you have testified?

A. I testified in the Cleveland conspiracy trial a couple of weeks ago. I testified before grand juries in Denver, Cleveland, and New York.

[fol. 657] Q. Will you give us the dates when you testified before the grand juries taking them one by one?

A. Well, I testified in Denver I believe it was in the summer of '56. I don't recall just what month that was. I testified in Cleveland before the grand jury about January of '57. I testified in Denver in the summer of '57—no, I think that would be the summer of '56 in Denver, and—

Q. I am sorry. That is what you said before.

A. It occurs to me I am a little confused as to these dates, but I think that was the summer of '56.

Q. When you say "that" what was that?

A. The Denver Grand jury.

Q. All right.

A. I testified in Cleveland in I believe it was January of '57 before the Grand Jury and later at the Cleveland conspiracy trial that is in the process of being tried now.

Q. That is what you were referring to when you said—

A. And—

Q. Just a minute, Mr. Gardner, please. Let me finish my question. Why don't you sit back?

A. I am very comfortable, Mr. Witt.

Q. Take your time, because you make me uncomfortable if you don't.

A. I am very sorry.

Q. When you just said again something about the Cleveland conspiracy trial that is the trial in which you said you testified a couple of weeks ago?

A. Yes, sir.

Q. And in any event with respect to the Cleveland Grand Jury you said that was you think January of '57, is that right?

A. Yes. At New York I believe it was about December of '56. There, again, I am not sure. It was in the wintertime, and it occurs to me it was probably about that period of time, somewhere between December and February. It could have been after the New Year.

Q. That would be between December of '56 and February of '57, right?

A. Yes.

Q. You haven't testified in any trial in New York in open court?

A. No, sir.

Q. Now, aside from these occasions when you testified as a witness for the Government have you ever given testimony in any other trial, hearing or proceeding before a body of the United States?

A. Well, I was subpoenaed before the McCarran Committee in Cleveland. I believe that was in '52.

Q. And did you testify?

A. Yes, sir, I did.

Q. Now, Mr. Gardner, you referred to that as the McCarran Committee. Is that the committee also more officially known as the Senate Internal Security Subcommittee?

A. Yes, that's right.

[fol. 658] Q. You said in '52. Do you remember when in '52 that was?

A. Offhand I can't recall. It was during the summer of '52.

Q. Do you recall how many members of the Subcommittee sat during those hearings when you testified?

A. All I recall was Arthur Watkins, the Senator from Utah.

Q. Any others?

A. I don't recall any others. There may have been. There

were several fellows up in front, but Senator Watkins was the Chairman of the Committee that met there.

Mr. Witt: May I talk to Mr. Kelley about the Senate hearings—I have already discussed it with him—off the record, please? If the Court please, based on my off-the-record discussion with Mr. Kelley I now propose that it be stipulated that the witness Fred Gardner testified before the Senate Internal Security Subcommittee in Cleveland on April 17, 1952, and that this copy of those hearings and quoting Mr. Gardner's testimony is an official copy published and put out by the United States Senate relating to those hearings.

Mr. Kelley: We stipulate to that.

The Court: All right.

Mr. Witt: And Mr. Kelley has also agreed off the record, if the Court please and ladies and gentlemen of the Jury, that I may use this document in further cross examination of the witness.

Mr. Kelley: I want the record to be clear on that. I have agreed that it is official and that so far as material or relevant that he can. It is not a broad consent.

The Court: All right.

Mr. Kelley: I want to reserve the right to object to any particular questions.

Mr. Witt: That is understood.

The Court: All right.

Q. Now, Mr. Gardner, you said a moment ago that your recollection was that you testified before that Senate Subcommittee in the summer of '52. Now that you have heard [fol. 659] the stipulation to the effect that you testified on April 17, 1952, would it be your recollection now that it was that date?

A. Well, it could very well be. I said the summer of '52 only because it was warm weather when we had it, and warm weather comes to Cleveland in April too.

Q. Now, Mr. Gardner, before you took the witness stand in this trial last Thursday you had given information to the FBI, hadn't you?

A. Yes, sir.

Q. Will you tell us according to your best recollection when was the first time you gave information to the FBI?

A. Well, the first to the best of my recollection it was six to nine months after I was expelled from the Party which took place in, oh, I believe about April, March or April of 1955.

Q. And when you say which was March or April of '55 are you referring to the time when you were expelled from the Party—

A. Yes, sir.

Q. Mr. Gardner, please let me finish my questions. Will you please read the question?

(The reporter read the last question.)

Q. —or are you referring to the time you first gave information to the FBI?

A. I am referring to March or April as the time that I was expelled from the Communist Party.

Q. And you said it was six to nine months after that that you first gave information to the FBI, is that right?

A. That's right.

(Document marked Defendant's Exhibit I for identification.)

Q. Mr. Gardner, didn't you give information to the FBI in Butte, Montana, in August of 1955?

A. Well, I don't recall the exact date. I fix the time at approximately six to nine months after I was expelled from the Party. Now, I don't know how to fix the exact date. There was first a contact made in which no information was given.

Q. Mr. Gardner, please forgive me for interrupting you, but I haven't asked you to explain the operations of your mind or go into something else. I simply asked you whether you recall giving information to the FBI in Butte, Montana, in August of 1955.

A. And my answer is I do not recall giving information in August.

Q. Now then, Mr. Gardner, I show you Defendant's Exhibit I for identification, which is a document furnished to [fol. 660] the defense by the prosecution, and I will ask you

to look at that page, which is marked with that exhibit number, read what is on that page, check the date there and at the top of that form, and I ask you whether that doesn't say that you furnished—

Mr. Kelley: Just a moment. I think, if you are going to read from the exhibit, it should be offered in evidence before you read from it.

Mr. Witt: I want to lay foundation. I don't care, either way.

The Court: I think it can be offered. The point Mr. Kelley is making has some merit in this, if he reads from the document, why, of course, it should be in evidence. If you wish to show it to him to refresh his recollection and ask him if he recalls that he made that statement—

Mr. Witt: I will do it the way your Honor suggests.

Mr. Kelley: Counsel was reading from it. That was my point.

Mr. Witt: I am sorry if there is any question about anything I am going to read in the record. It is going to get in evidence.

The Court: The document itself can be offered in evidence if it is relevant, but I think you can ask him if he recalls from looking at the paper you have displayed to him whether he did what you wish to ask him.

Mr. Witt: I will do it either way as your Honor suggests. I am used to the other procedure.

The Court: The point Mr. Kelley was making was you were reading from something that wasn't in evidence.

Mr. Witt: I might as well offer it.

The Court: Yes.

Mr. Witt: I offer in evidence this one-page document which has been marked Defendant's Exhibit I for identification.

[fol. 661] The Court: Is there any objection?

Mr. Kelley: Yes, the Government objects to its introduction in evidence and its use on cross examination for the reason that there is no proper foundation laid, and specifically, it is my position that before it can be used for any purpose it has to be shown that the witness had seen this and adopted the statement as his own.

The Court: At the moment you are just engaged in fixing a date, is that right? Is that what the purport is now? I think you had better stay with that now, and I will reserve ruling on its admissibility in evidence. The question at the moment is, as I understand it, inquiry directed to whether he made a statement to the FBI at about the time Mr. Witt suggested.

Mr. Witt: No, I am not suggesting anything in view of what Mr. Kelley said. I want to show from the FBI's own records as furnished to the defense as to when it was.

The Court: You may be able to show it as to the date but not as to the contents, is Mr. Kelley's objection at the moment, and I think we had better get the date established, and then you can let the witness read that and ask him if he made the statement or something along that line.

Mr. Witt: I am not going into content in terms of this document. There is no content on it except the date, this particular page.

The Court: Well, if it is only admitted as to the date—I haven't seen it, and I do not know what you are talking about. I am reserving ruling on the motion for its admissibility in evidence, and let's see if you can develop what you are talking about, or, as I understand, it is a date, by letting him refresh his recollection and look at it and see what he says about that.

Mr. Witt: May I have my offer in evidence of this document pending—

The Court: Let me see what it is. I am not advised as to what it is. You are only offering this one sheet?

[fol. 662] Mr. Witt: That is all. That is all that is relevant.

The Court: What objection do you have to that one sheet? There is no statement.

Mr. Kelley: I have no objection to his handing it to the witness as you suggested and asking if this refreshes his recollection as to the line of inquiry, but I object to it as a fundamental proposition of introducing it until it is shown that the witness had previously seen it and adopted it as his statement.

The Court: There is no statement in it, is the point I am making. The statement is simply to the effect that he

gave certain information, and there is nothing in the sheet he has offered that discloses any statement at all. It is just the fact that he did talk to the agents at that time.

Mr. Kelley: That's correct, and, if he wants to use it for purposes of refreshing his recollection, I have no objection.

The Court: I think I will admit this sheet in evidence for the purpose of showing simply the date of this alleged discussion with the FBI Agents.

Mr. Witt: Thank you, your Honor.

(Defendant's Exhibit I for identification received in evidence.)

Q. Mr. Gardner, I will ask you to look at this one sheet, Defendant's Exhibit I, and I will ask you to read it to yourself, and I will ask you whether that doesn't refresh your recollection that you furnished information to the FBI in Butte, Montana, in August of 1955.

A. Yes, on August 31 and September 9. That is about six months afterwards, and I say that would fit into my thinking that it would be about six months after I was expelled. That is the only way I can fix the dates as probably correct. I don't remember the specific discussion now.

Q. Mr. Gardner, when was it you testified in the Cleveland case in open court again?

A. I think it was a couple of weeks ago.

[fol. 663] Q. Can you fix the exact dates?

A. I imagine it was last Monday.

Q. Last Monday?

A. A week ago.

Q. That would be Monday, the 20th, is that right?

A. I think so. I think that's right.

Mr. Witt: In order to save time again, your Honor, may it be stipulated that the witness testified in the Cleveland case, United States vs. West, the week before last on Tuesday, January 14, Wednesday, January 15, and Thursday, January 16, 1956?

Mr. Kelley: Does that appear in here some place?

Mr. Witt: May the record also show that in order to save time this morning I exhibited these transcripts to Mr. Kelley last week so he could look them over, discuss them

with the witness, so we would not have to waste time on these problems this morning?

Mr. Kelley: I resent the implication of that. They were submitted to me so that the witness could look at them to determine whether it was a correct reflection of his testimony at the trial. I did not have an opportunity to look at them. They were returned as soon as the witness had checked them.

Mr. Witt: I didn't mean to imply Mr. Kelley checked them.

The Court: What is the point? What he is asking for is a stipulation as to accuracy?

Mr. Witt: No, at the moment as to the dates.

Mr. Kelley: As to the dates he testified. I don't know what dates he testified.

The Court: The witness has testified to the dates. He testified that he testified there at about the time he indicated.

Mr. Witt: I am impeaching the witness as to his memory.

The Court: Well, if the records are in contradiction, of course, you will have to establish it by the record.

[fol. 664] Mr. Kelley: If you will point it out, I will be glad to stipulate to it. I am not going to read the whole thing to figure it out.

Mr. Witt: You don't have to read the whole thing. I think we can show that. We may have to bring the reporter in from that trial, your Honor, but I don't think that will be necessary. May I show this to Mr. Kelley?

The Court: Go ahead and show it to him and ask him about it. I am a little in the dark as to what you are trying to accomplish here.

Mr. Witt: I want to show the exact dates the week before last in Cleveland.

The Court: Ask him.

Mr. Witt: I just asked him, and I am seeking to impeach him.

The Court: I do not see any basis for impeachment in that respect.

Mr. Witt: If the Court please, I do not think you should make a comment on that until I complete this.

The Court: Show him the dates.

Mr. Witt: In view of that discussion I will ask Mr. Kelley.

The Court: All right, show him.

Q. Mr. Gardner, isn't it true that you testified in Cleveland on Tuesday, Wednesday, and Thursday, January 14, 15, and 16, 1958?

A. I think that's right since you mention it. I might have misjudged that by a day or two.

Q. Now, Mr. Gardner, you were cross-examined, weren't you, when you were on the witness stand in Cleveland about when it was that you first furnished information to the FBI?

A. I believe I was.

Q. Didn't you testify there on cross examination—

[fol. 665] Mr. Witt: Excuse me, your Honor.

Q. Didn't you testify on cross examination in Cleveland that the FBI first spoke to you at home in Butte in March, 1956, as a result of which you thereafter went to the FBI office in Butte and then signed a statement for the FBI in July of 1956?

Mr. Kelley: The Government objects to that as improper procedure.

The Court: I will sustain the objection. You can ask him if he made answers specifically to the questions and read the answers, and, if they are contradictory, you can show the contradiction by the record, but your using your interpretation of the testimony and asking him with respect to that I do not think is proper. He has a right to be faced with the precise statement.

Mr. Witt: I was trying to save time. It ran over many pages.

The Court: Read the specific questions and answers.

Mr. Witt: It becomes confusing again. I will do the best I can, and then we will see if we can't save time.

Q. All right, Mr. Gardner—

Mr. Witt: Do you want to follow, or shall I ask the witness?

The Court: Ask the witness.

Q. I will ask you if you didn't give the following answers to the following questions on cross examination in Cleve-

land on page 807: "Answer: I gave some information to the FBI, I believe, about six to nine months after I was expelled from the Communist Party. Question: Would that be December of 1954? Answer: I was not expelled in '54, so, it would not be December. Question: Would that be December of 1955? Answer: I would rather believe it was sometime early in '56. Question: And to your best knowledge what date was that in 1956? Answer: Oh, best of my recollection it might be March. Question: And was it the first week of March? Answer: I don't remember. Question: To [fol. 666] your best knowledge? Answer: I'm not positive that it was in March. I'm saying March, that is the best of my recollection in that period. It could have been March, it could have been April. Question: Of 1956? Answer: Of 1956."

Turning to page 808, "Question: Now, is this the time that you gave this information to these FBI Agents in March of 1956? Answer: What information, sir? Question: Relative— Answer: I don't understand your question. Question: Did you make any statement relative to your Communist Party activity to the FBI at that time? Answer: Yes, sir. Question: Concerning the subject matter of your testimony here today? Answer: I don't recall making any statements relative to anything I have testified to here today. I told them about my Communist Party activities. Question: Where did you meet with these agents of the FBI? Where did you meet with them? Answer: I believe in the Office of the FBI. Question: Where? Answer: In Butte, Montana. Question: And what day was that or week, if you recall, and what month? Answer: The best of my recollection it was in March or April of 1953."

May I stop there? That is an obvious typographical error. That should be March or April of 1956. Is that right, Mr. Gardner?

A. That's right.

Q. "Question: Now was this information that you gave to the FBI Agents taken down at that time, if you recall? Answer: I don't recall. At least I don't know whether— there was nobody taking notes, if that is what you mean."

Mr. Witt: Then, I will skip a little at the top of page 809, if the Court please and Mr. Kelley, to save a little time.

Q. "Answer: No, sir. They—as I recall it, the first contact was made with me at my home. They came to my home. And it was sometime after that, maybe two—three weeks after that I went to their office. Question: And when they first got to your home, how many agents were there at that time?" I will skip that and get to the dates, if the Court please and Mr. Kelley, top of page 810. "Question: To the FBI Office in Butte? Answer: Yes, sir. Question: Was that still in May or was that— Answer: Well, it was in that period of March or April. Question: Now when you got down to the office did you make any statements to the FBI [fol. 667] then? Was it the same Agent? Answer: Well, I talked to them, then, about my activities." Now, Mr. Gardner, having heard that testimony of yours in Cleveland do you recall that you testified there that—

The Court: The question is is (sic) to ask if he recalls that as being his testimony or if he didn't so testify. If he didn't, you can offer the record if it is contradictory. If he says that is the way he testified, that is it.

Q. Do you recall giving that testimony?

A. I would believe that is my testimony.

Q. Now, Mr. Gardner, did you give information at any time to the FBI while you were with Mine-Mill during the period from 1951 to 1955?

A. I did not, and I don't believe I even knew an FBI Agent during that period to know he was an FBI Agent.

Q. You have gotten to know quite a few FBI Agents since you left Mine-Mill, haven't you?

Mr. Kelley: The Government objects to that as argumentative.

Mr. Witt: I withdraw it.

Q. Mr. Gardner, when you testified before the Senate Subcommittee in Cleveland in April of 1952 do you remember being asked where and when you were born?

A. No, I don't specifically remember that.

Mr. Witt: Pursuant to our understanding I will not have this document marked for identification. Our understanding goes to all transcripts and official documents.

The Court: All right.

Q. Now, Mr. Gardner, I will ask you whether you don't recall being asked the following question by Mr. Arens of the Committee staff and giving the following answer when you were before Senator Watkins in Cleveland in April, 1952: "Mr. Arens: Where and when were you born? Mr. Gardner: I was born in Galena, South Dakota, in July, 1907." Do you remember that?

A. I don't remember specifically the dates.

Q. Were you born in 1906 or 1907?

A. I was born in 1906, and I have a birth certificate to bear it out, and, if they made a mistake there, I can't help that.

[fol. 668] Q. I asked you if you remember giving that answer when you were before the Subcommittee.

A. No, sir.

Q. Mr. Gardner, before you took the witness stand in this trial last week—I withdraw that. I am sorry. Mr. Gardner, it is true, isn't it, that when you were with Mine-Mill you would submit yourself so-called expense vouchers to the International Union twice a month?

A. Yes, sir.

Q. And those expense vouchers would show what expenses you had during the semi-monthly period particularly as to your mileage and per diem and extraordinary expenses, is that right?

A. Well, usually, unless they was asking us for some special contributions and they would tell us, "Well, you can put a trip down to cover that for the Party." I have had that happen.

Q. Aside from those occasions when you made a special trip for the Party normally they would cover your expenses during the semi-monthly period, is that right?

A. Yes, sir.

Q. Did you keep copies of those vouchers for yourself?

A. I probably did for a while.

Q. During what period was that when you say "for a while"?

A. Oh, I would keep them for a couple of months to see if there was any question.

Q. Then you would throw them away?

A. Yes.

Q. Do you have any copies of those vouchers in your possession at the present time?

A. I doubt it. I think I threw everything away.

Q. In any event did you look at copies of any of your vouchers before you took the witness stand last week?

A. No.

Q. At any time before you took the witness stand last week did anybody show you copies of your Mine-Mill vouchers?

A. No, sir.

Q. Before you testified before the Grand Jury in Denver did anybody show you copies of your Mine-Mill vouchers?

A. No, sir.

Q. Mr. Gardner, where did you go to school?

A. Oh, I went to a little country school near Galena, South Dakota, whenever it operated.

Q. How far did you get in school?

A. About the second grade, about that equivalent.

(Document marked Defendant's Exhibit J for identification.)

[fol. 669] Mr. Witt: If the Court please, I have shown this one page of the FBI material to Mr. Kelley which has been marked Defendant's Exhibit J for identification, and I now offer it in evidence.

Mr. Kelley: You are offering it in evidence?

Mr. Witt: Yes.

Mr. Kelley: The Government objects to this for the same reason that it is not, no foundation laid for its admission into evidence for any purpose at this point. If he wishes to use it for refreshing memory or something, that is one thing, but, unless it is shown that the witness has seen this and adopted it, we do not think it has any probative value.

The Court: What is the relevancy?

Mr. Witt: I want to show that he gave the FBI information different—

The Court: Well, ask him that.

Mr. Witt: Before Mr. Kelley suggested that I get it admitted in evidence first. I am trying to do as Mr. Kelley wants me to do.

Mr. Kelley: You were reading from it before.

Mr. Witt: There is one—

The Court: I do not see any basis shown here for offering it in evidence at all at the moment on the face of it.

Mr. Witt: Let me ask the witness this question if it is a question of foundation, but before I do with respect to Mr. Kelley's statements that in my foundation I haven't been showing that the witness has seen this or adopted it or approved it the mere fact that we have this indicates that it is a statement of the witness under Section 3500.

The Court: I am not ruling on that at the moment. I am simply ruling there is nothing that has been called to the Court's attention to make it even relevant.

[fol. 670] Mr. Witt: Let me ask the witness this question as further foundation.

Q. Mr. Gardner, didn't you tell the FBI in Butte that you had had seven years of elementary education?

A. No, sir, I have never told any Government agent. I often used the fact that I have got eight grades of schooling if I am applying for a job, and I have used that often, seven or eight grades.

Q. But you have never told the FBI that you had seven years of elementary education?

A. No, sir.

Mr. Witt: In view of that I offer Defendant's Exhibit J in evidence.

The Court: I think the offer will be refused at the moment without getting into a lengthy discussion of the situation here. I think this is hearsay on the face of it I think at the moment.

Mr. Witt: MayI be heard on that a moment?

The Court: I think you might as well go ahead. We will be taking a recess in 20 minutes, and it is not something to get involved in an argument about before the Jury.

Mr. Witt: I think we will have to stop on that. If we do not get this issue clarified, it will impede the rest of my examination.

The Court: I wish you would proceed if you can. I can tell if it comes in that category.

Mr. Witt: I have a fairly extensive cross examination prepared on the basis of our understanding of the admissibility of this FBI material in evidence, and it would be too disconcerting to try to revise it now in open court.

The Court: Well, I think I will reserve ruling on this, and you may proceed to your next question, and I can tell if it comes in the same category, until we have the recess at 11:00 o'clock.

Mr. Witt: I have my cross examination constructed in a certain way, your Honor.

[fol. 671] The Court: We will overrule the objection, and you may renew the question later after we discuss the matter. I will sustain the objection rather than overrule it.

Mr. Witt: As I said, your Honor, in view of that ruling I have great difficulty continuing with the course of my cross examination as I have outlined it.

The Court: If you will proceed.

Mr. Witt: Give me a moment, and I will see if I can go to something else.

The Court: You may proceed.

Mr. Witt: When are you intending to recess?

The Court: I am intending to recess at 11:00 o'clock.

Q. Mr. Gardner, in your testimony last week about this trip you made with Travis from Buffalo to Port Colborne and Welland I think you testified last week that your recollection is that it was in the fall of 1951?

A. Yes.

Q. You thought September or October?

A. Yes.

Q. Are you able to fix that date a little more exactly?

A. No. That is the best of my recollection.

Q. You testified that you met Travis in Buffalo on that occasion, is that right?

A. Yes, sir.

Q. Travis asked you to meet him in Buffalo?

A. No, it occurs to me the Cleveland Office had said that they had a call from Travis asking—I am not sure whether I did or not—it does occur to me now since it has been raised that I did have a call from Travis asking me to meet him in Buffalo. I would not be positive. Either that or the office

had told me that Travis had called. I just don't recall for sure how it was fixed.

Q. Do you recall whether it was the office or Travis himself?

A. I would rather think it was the office that set the meeting up.

Q. For some reason you would rather think it was the office?

A. Yes.

Q. What is your reason?

A. I don't remember talking to Travis on the phone until after I had met him.

[fol. 672] Q. When you say the office are you referring to the Mine-Mill Office in Cleveland?

A. Yes.

Q. And whom specifically are you referring to in the Cleveland office?

A. Well, the Board member in charge of that office.

Q. What was his name?

A. His name was Ray Dennis.

Q. Now, whether it was Ray Dennis who told you about meeting Travis in Buffalo or whether it was Travis on the long-distance phone do you recall whether you were told why you were wanted to go on that little trip with Travis?

A. Yes, yes.

Q. What was that?

A. I recall a discussion with the Board member there relative to my taking Travis across the border because of the difficulties he was having getting over the border.

Q. So, now, your recollection is that was definitely the Board member, Ray Dennis, who told you about meeting Travis and not Travis on the long-distance phone?

A. At least it was the Board member who gave me the instructions on the whys and wherefores of it.

Q. In the course of telling you that did Dennis tell you that Mine-Mill people, Mine-Mill officials had difficulty getting across the border?

A. Well, I recall him specifically saying the difficulties that Travis was having getting across the border, but, as I also recall, him telling me Jack Clark had no problem getting across the border.

Q. Did you know Jack Clark as a member of the Communist Party at that time?

A. No, sir, I did not.

Q. Did you ever know Jack Clark as a member of the Communist Party?

A. No, sir.

Q. Jack Clark was the President of the Union at that time, wasn't he?

A. Yes.

Q. When was it you came to work for Mine-Mill?

A. The latter part of August or early part of September, 1951

Q. Do you remember Ray Dennis telling you anything else about why you were wanted to meet Travis at the border?

A. Well, the essence of the thing was that I was to meet him to get him across the border because my car was not known on the border and neither was I known as a person who crossed the border, so, it was felt I could do the job easier than, for example, and that was specifically mentioned, the Buffalo staff member who is known at the border. [fol. 673] Q. Did Dennis tell you when he discussed that with you what Travis wanted to go into Canada for?

A. No, sir, I don't think so. I don't recall any discussion.

Q. Did he tell you Travis wanted to go to Canada on some Communist Party affair or escapade?

A. I don't recall any discussion as to the reasons for Travis going, just the fact that I was to get him across.

Q. Now, you testified that after you crossed the border into Canada you went to the home of the Business Agent of Port Colborne, is that right?

A. Yes.

Q. Do you remember his name, the name of the Business Agent?

A. It occurs to me it was Mike Kobenac, but I would not be too sure of that name. I am very unfamiliar with the Canadian staff.

Q. You also met Clark in Buffalo at the same time you met Travis?

A. Yes.

Q. And was there any discussion about Communist Party affairs or anything like that during the course of your drive with Clark and Travis from Buffalo to Port Colborne?

A. No, sir. Most of the discussion had to do with the crowded condition of the front seat of the little car.

Q. That was yours?

A. That was my little car.

Q. Your vintage Chevrolet?

A. That was it.

Q. And when—strike that, please. How long were you at the home of the Business Agent?

A. Well, I don't remember. My guess it would be a few hours, maybe four hours.

Q. Any Communist Party discussion there?

A. No, sir. I don't recall any Communist Party discussion there.

Q. Did you find out then or have you found out on any subsequent occasion that the Business Agent was a member of the Communist Party?

A. No, sir, I don't know him at all.

Q. Do you recall who it was aside from Travis and yourself who took the drive from Port Colborne to Welland?

A. No, sir, I don't.

Q. Was Clark along on that occasion?

A. Well, I don't think Clark was in our car. There were about four people in our car including Travis and myself, but I don't remember who else was along.

Q. Did the Business Agent go along?

A. I am sure the Business Agent was at the Welland meeting, but I don't know whether he was in that car or not. He might have driven it for all I remember.

[fol. 674] Q. You just referred to a Welland meeting. What kind of a meeting was that?

A. That was a staff meeting to the best of my knowledge of Mine-Mill Canadian staff.

Q. Now, Mr. Gardner, I want to get to your conversation with Mr. Travis on the way back to Buffalo, and I will ask you to be good enough to give us the substance of that conversation again.

A. Well, to the best of my recollection we first discussed

the fact that, well, he was telling me that I came to Mine-Mill well recommended from the Party in Cleveland, he was sure I would be happy in the setup, and that we would get along pretty well. We discussed the resignation, his public resignation from Mine-Mill, it was published in the Union paper and I presume other papers, and how he recognized that now as an error, because it gave the enemies of Mine-Mill an opportunity to see through the resignation as being not an actual resignation. We discussed the problems of getting across the border and how the Canadians was clamping down on the members of the Party in this country getting across the border. We discussed the fact that some of the unions were having no difficulties and to detail that conversation because they were the old line AFL and CIO unions who were apparently going along with the Government. That is the best of my recollection at the moment that we had any discussion.

Q. Mr. Gardner, after you began giving information to the FBI at any time thereafter until you took the witness stand here last week did you tell the FBI about this trip of yours from Buffalo to Canada with Travis and this discussion on the way back?

A. I don't suppose I did unless they asked me about it, and I don't remember them asking specifically about it although, again, I don't want to be too sure of that. I had a policy generally of answering their questions and telling them what they specifically asked me about, and I don't remember whether they ever asked me about that trip or not.

Q. You didn't give the FBI any information unless they asked you?

A. Well, generally that was it.

Q. Now, did the FBI ever indicate to you that they knew about this trip of yours to Canada with Travis without your telling them?

A. I can't recall them ever asking me about the trip at all.

Q. And you didn't ever volunteer any information to the FBI?

A. Not that I recall.

Q. In all your discussions with the FBI you never volun-

tegred any information? You simply answer their questions?

[fol. 675] Mr. Kelley: May it please the Court, I think that is irrelevant.

The Court: I think I will sustain the objection to the last question.

Mr. Witt: All right, if the Court please.

Q. Take the conversation you had with Travis at his home here in Denver in June of 1953, did you ever tell the FBI about that?

A. Not that I can specifically recall. I don't think they ever asked me about it that I can recall. If they did, I told them about it. I just don't remember them asking me about it.

Q. Did you ever give the FBI any information about your stopover here in Denver in June of '53?

A. Yes, I think I was asked about it once. Here, again, I am just not too sure, but I vaguely remember some question about coming to Denver.

Q. All right, what do you vaguely remember telling the FBI about that stopover in Denver?

A. Well, I remember they were asking me specifically about some person here in Denver.

Q. What person was that?

A. Harold Sanderson.

Q. All right, what else?

A. And whatever they asked me I told them. I don't remember what it was specifically.

Q. What else did you tell them aside from telling them about Harold Sanderson?

A. I don't remember.

Q. I will ask you again whether you told them anything about Travis in connection with that stopover in Denver in June of '53.

A. I don't remember whether I did or not. I don't recall telling them, but I could have.

Q. Is it possible that you told them that you stayed at Travis's that night?

A. Yes, it is possible, but I don't remember whether they went into that or not.

Q. They didn't ask you when you got to Denver?

A. I don't know. I don't remember. All I remember about the request on the Denver thing that I can specifically recall is that they were specifically asking me about Harold Sanderson, and I don't recall them asking me about anybody else in Denver, and I think that my answers would probably have been around Harold Sanderson.

Q. When was it that you answered those questions of the FBI about Harold Sanderson in connection with your stopover in Denver in June of 1953?

A. I stopped over in Denver in the early part of June of [fol. 676] 1953, and I would not know when they asked me about it. As I understand, that is your question, when did the FBI ask me about Sanderson.

Q. Yes.

A. I don't recall when it was.

Q. Where was it that you talked to the FBI?

A. Butte.

Q. That would have been sometime in '56?

A. I am not too sure when it was. There were several conferences, and they ran into late '56, and I don't remember which specific conference it was that they were talking about Harold Sanderson.

Q. But you are sure it was in Butte?

A. Yes. I don't remember meeting the FBI any place else.

Q. Do you recall when is the last time you gave the FBI any information about Harold Sanderson?

A. Well, I imagine that would be the last time. I don't recall them ever asking me about that again.

Q. When you say that would be the last time can you fix the last time?

A. No, I can't. It was one of the conferences in Butte in which the question of Harold Sanderson came up.

Q. When was the last time you talked to the FBI in Butte about Travis or Mine-Mill or Harold Sanderson?

A. Oh, gee, I don't remember when it would be. It might be in the middle, maybe the late summer of '56, and I don't remember talking about Travis. I just don't remember the FBI ever asking me about Travis.

Q. You don't recall giving the FBI any information about Travis, is that right?

A. Well, I don't offhand. I don't recall it. It is entirely possible, because they asked me about a lot of people.

Q. In Mine-Mill?

A. Yes, in Mine-Mill. Wait a minute, in Mine-Mill, I don't think they asked me about many in Mine-Mill. They asked me a lot about UE.

Q. Just take Mine-Mill. You said they asked you about Harold Sanderson, is that right?

A. Yes.

Q. They asked you about Ray Dennis, is that right?

Mr. Vincent: The Government objects to that.

Mr. Kelley: May it please the Court—

Mr. Witt: I am laying a foundation for impeachment. This is the he of this man's testimony.

[fol. 677] The Court: You will have to establish some relevancy between this and the case, because his statements about something entirely detached from this case would not be relevant at all either on impeachment or anything. It has to be on something that has something to do with this matter and investigation.

Mr. Witt: Your Honor, I would like to argue that. I think that is quite important.

The Court: It is 11:00 o'clock. We will have a recess now, and the Jury will bear in mind the admonitions I have given about discussing the case and so forth. You may announce a recess.

* * * * * * *

[fol. 678] In Chambers

COLLOQUY BETWEEN COURT AND COUNSEL RE SCOPE OF SECTION 3500 AND PROCEDURE

Mr. Kelley: We would like the record to show that all the Government lawyers and Mr. DeCook are in Chambers during this recess.

Mr. Witt: That is not necessary.

Mr. Kelley: I think it is necessary in view of the remarks and request of counsel.

The Court: The record may so show. What is it that you wish to point out?

Mr. Witt: The two issues we have as a result of this morning's cross examination. As I understand them, one, the admissibility in evidence of the FBI statement which we have pursuant to Section 3500 without any further foundation, and, two, this line of interrogation I was just pursuing with the witness. Taking the first one, your Honor, if I understood Mr. Kelley the two times he made the objection about the admissibility of the FBI statements in open court this morning, he was arguing that these were not statements of the witness. Now, I have two things to say about that. One is that the mere fact that those have been produced by the prosecution and handed over to the defense makes them by definition statements of the witness without any further foundation in view of the definition of "statements" in Section 3500. Two, I thought with respect to the witness Eckert we had cleared this hurdle and it was established that any of those could go into evidence any time we felt we wanted to.

The Court: First, I want to get the Government's position about the first point you raise, and that is with respect to whether at this stage of the proceeding there has to be some showing that they are the statements of the witness. Now, as I pointed out yesterday, it is corollary to what we talked about Saturday, rather, it wasn't yesterday, the [fol. 679] Government was required to produce statements which came within the category and definition as provided by 3500, Title 18, and the Government produced this particular statement. Now, it is my notion that where the Government has produced the statement, why, they have conceded in effect that it is a statement within the meaning of 3500. Now, what have you to say about that?

Mr. Kelley: That is not our understanding, and it is not the premise that we produced these on, your Honor. We conceived it our duty to produce any documents in our files which related to the testimony of the witness on direct examination, and we further felt that it was for the Court to decide whether or not they were statements within the terms of the statute.

The Court: Where is there anything in the statute that would indicate that?

Mr. Kelley: Well, we have one of the first cases of any significance that has been tried under this. There is very little law to go on, and in an effort to not commit any error and to be absolutely fair on the thing we have produced things which we feel have no standing as statements under the Act, because they are on the face, they show they were not contemporaneously recorded, and it is our feeling that in general that FBI reports are hearsay and that, if a strict interpretation of the statute is given, that all the Government would be required to produce would be signed statements or statements written out, reports written out by the witness and handed to an Agent which he of necessity would adopt or statements which the Agent has prepared as a result of an interview and has submitted back to the witness and asked if that reflected the substance of the interview, something like that would be the only type of thing that would come within the definition of the terms of the statute, Section 3500. We have not proceeded to this point on the assumption that everything we produced was a statement.

The Court: Well, the statute itself I again repeat, as I read it Saturday in detail and for the record, and, of course, it stands for itself, I thought rather expressly said the things that the United States should produce were the things that amounted to statement within the statute. Isn't that what it says?

[fol. 680] Mr. Kelley: I think that is what it says, your Honor. I think probably, your Honor, this is almost a case of first impression, at least it is the first one that involved the problems that we have here in this District, and we are feeling our way along on it, and I think I made the statement in reference to Eckert's documents and things that were submitted that we did not concede that those were contemporaneously recorded, that they were substantially verbatim, and a number of other things that would qualify them for statements.

The Court: That fact is a matter that is peculiar within the knowledge of the Government. By what process or upon what basis would the Court determine what amounted to a

statement where these questions would be involved collaterally? If you bring in something and say to the Court, "Here is the statement we are producing under 3500," that in itself would admit it seems to me that the statement was one within the category of 3500 and producible under that, and then the only question, as I pointed out, as I see it remaining for the Court to determine, is whether the statement that you produced, which was a statement in fact under the provisions of 3500, contained matter which did not pertain to the direct examination of the witness and that the Court's duty was to excise matters that were not included in that category, and, of course, the assumption was when the Government said, "Here is a statement," that it would come within one of the definitions of "statement" contained there in that last section. Otherwise, I pose the question, how could the Court determine whether it was contemporaneously made or all of those other factors or submitted to the witness and approved by him, what process would the Court follow to determine that?

Mr. Kelley: Your Honor, I am not saying that your interpretation of this statute and the procedure is not correct. I am stating that the Government proceeded on a different interpretation of it and that matters which have gotten in or have been delivered to the defense are matters which are hearsay and have no proper—well, let me state it this way: They are not properly admissible in evidence because of the hearsay nature. You have got to assume, to follow out a theory that they are admissible per se, that everything that a witness says to an agent is correctly recorded and that FBI agents are infallible and not subject to human frailties, when they don't make a report for a week or two [fol. 681] weeks or even a month after an interview, and we have taken the position that even if they were not contemporaneously recorded, that we would not, strictly speaking, that we would not attempt to draw the line as to when they were contemporaneously recorded. It is apparent on the face of many of them that they don't purport to be verbatim or substantially verbatim reports, but, again, we have submitted them to the Court.

The Court: Where do you find anything within the framework of the statute or the theory of the statute that calls

upon the Court where you have produced the material to determine after you have produced it whether it constitutes a statement or not? By what process could the Court determine that? It says they are to be examined in camera which implies right on the face of it that the examination has to be made on the basis of what is submitted without reference to any other collateral hearings or talks or anything else with anyone. How would the Court know whether the witness had seen the statement and approved of it or all of those factors? There may have been a literal verbatim transcript for all the Court knows. If you brought it in here and said, "Here are statements that we are required to furnish under 3500," why, by what process would the Court then ascertain that it wasn't a statement under 3500 after you have branded it as such by bringing it in?

Mr. Kelley: Well, as I say, I cannot disagree with your reasoning, but that we proceeded on the other premise, the premise I have tried to explain, and the mere fact that we have produced them it doesn't seem to me that that cloaks them with any greater value than they show they have on their face.

The Court: Well, in reference to the Congressional history of this particular 3500 as far as my study takes me, that the very reason that the Congress defined "statement" as they did was to eliminate the things that come within the hearsay rule you are talking about, and that was done by definition, and, as I say, when you come in and give the Court something and say, "Here are the statements that we are obliged to produce under 3500, we object to submitting them in their entirety to the defense for the one reason that they contain matters which are not within the scope of the direct examination of the witness, and, therefore, we ask the Court to look them over in camera and to excise from the [fol. 682] statements we have offered the matters which we say are not pertinent within the scope of the direct examination, and, therefore, we wish you to do that and submit the rest to the defense," that is what you have said to me. There is no place along the line that the Court can determine whether these are statements or whether they are statements on the basis of the submission. So, I think they are entitled to use this statement that has been furnished them

as being a statement and therefore being the basis for impeachment, and I think I will overrule that objection that I sustained a moment ago which I did for the basis of having this discussion.

But I want to say one other thing which is merely cautionary in a way, that to make these things relevant from an evidentiary standpoint there must appear to be some contradiction, there must appear to be some deviation at least that would go to the credibility of the witness. Now, this one particular here I gather it does to this extent: that I think he testified on cross examination that he had gone to school for a certain length of time, and I think the report shows that he had seven years elementary education. That would come within the rule. But I think there has been a tendency, for instance, and I am not passing on the thing because I am not on the Jury, but the testimony that you read out of this trial in Cleveland, for example, I didn't observe anything contradictory about that. I may be mistaken, and that is a matter of argument for the Jury. But I am using that to point up what I mean, that it is going to have to be, whenever you offer this statement or part of it, it is going to have to be something that reflects on his credibility or his contradictory statement.

Mr. Witt: I agree with that. That is all I am trying to do. I think your Honor is mistaken about this Cleveland testimony.

The Court: I am just using that illustratively. I didn't immediately get the contradiction.

Mr. Witt: In that connection it is important for me, your Honor, because I do have difficulty in court, with all due respect may I suggest your Honor is perhaps a trifle impatient in court at those points.

[Vol. 683] The Court: I try not to be.

Mr. Witt: I am not saying it at all. I think your Honor is conducting a fine trial under terrible difficulties, but we are conducting the defense under serious difficulties too, and this stuff takes time, your Honor, and I am in the habit, and it may be my fault, perhaps it is, of trying to make the record as complete as possible. As I have said in connection with use of prior transcripts, I try to give the continuity. So, sometimes it takes a little more time and re-

quires a little more of the witness's prior testimony.

The Court: The next thing, the thoroughly practical problem, for instance, take this very specific case that we have before us on this question, should the whole page or the whole statement or just the contradictory part be received in evidence? My offhand impression is that the way to handle it best, he has testified that he did not make the statement to the FBI, that is, about the elementary education, my own impression is that the easiest way to keep the record straight would be to read from this statement. It is not in evidence, but that the statement reads as follows. I don't know how the mechanics should be handled, whether to let the whole statement in or not.

Mr. Kelley: I think the whole statement should go in. If any part goes in, the whole is admissible, because all it will require us to do would be to offer the balance of it on redirect. If they offer part of the statement, why, the whole thing is admissible. That is my understanding of the rules of evidence.

The Court: What do you think?

Mr. Witt: Oh, no, your Honor, I feel very strongly about it, and I am glad your Honor came back to this. Take this particular reference your Honor just made to that page containing the statement about his education. That takes only one sentence on that page, and obviously, that is the only reason I am using that page for impeachment. Now, it doesn't follow that simply because we used that sentence for purposes of impeachment that everything else on the page goes in, your Honor. Otherwise, the whole thing would be—

The Court: But—

[fol. 684] Mr. Witt: Let me say this from the practical point of view, no other point of view, I think there are other serious objections, the thing would be intolerable. Mr. Kelley's argument would also go to his testimony in Cleveland, that if I want to use one answer to one question on one page, Mr. Kelley's reasoning is we put the whole three volumes in on everything in the Cleveland case.

The Court: I adhere to your point of view, but I am trying to work out the mechanics of it. But because some place

along the line they are going to have to have some establishment of the source—

Mr. Witt: Yes.

The Court: To show what I mean, what is I think the practical problem, it is perfectly simple, the transcript, the authenticity of which is conceded, to ask the witness if he didn't make the following answer to that question, to read that, and he says he didn't, why, then, of course, you have a right to then offer the thing he did say in evidence for the purpose of contradicting him and that one sentence and one answer, not the whole record, that one sentence and one answer. To illustrate Mr. Kelley's objection and I think the limitation of it, if on redirect there is some other question or answer that qualifies this specific thing, you might have a right to bring that in, but you could not bring in the whole transcript.

Mr. Witt: I agree with that.

The Court: That is certain. But what I am trying to figure out here is where, by what process we can get this transcript into the category, say, of a transcript of evidence.

Mr. Witt: All right, your Honor, it occurs to me, may I just answer that question, because I am handling this and it is important to expedite the cross examination and not get into these problems? Take the two matters that came up this morning with respect to these FBI documents, in both cases that could have been read into the record without the whole page being offered very easily. With respect to the first matter all I was doing was establishing the date or dates when he first talked to the FBI. I do not think there is anything else on that page anyway. It doesn't matter. [fol. 685] With respect to the second matter, his statement about the elementary school education on that page, the rest of that page deals with other biographical material, as I recall it, but it doesn't matter. I think the simplest thing to do is to read the particular part which we are seeking to use for impeachment, and in this particular case just that sentence about his elementary school education.

Mr. Vincent: Might I say something on this, on this whole problem, that the Government at no time has conceded and does not concede that the documents produced to

the Court which in turn had been ordered to be produced to the defendant are statements within the statute.

The Court: I doubt that you did not concede that when you produced them.

Mr. Vincent: That is not our position. It is our position that we don't concede. Might we say in regard to producing them in evidence and using them that on its face the document that Mr. Witt was attempting to use this morning is a document written by a person other than the witness.

The Court: I don't know whether it is or not.

Mr. Vincent: It appears right on the face of the document, your Honor.

The Court: It doesn't to me. Let's not get into that, because I have held this: that any document that the Government produced and submitted to the Court as a statement of the witness comes within the definition of 3500 and that the Court's duty with respect to it solely then is to excise the portions that were not relevant, and, so, I don't want to get into any argument about whether it is a statement or it is not a statement.

Mr. Vincent: I didn't want to argue with your Honor, but I wanted something for the record on that. I might point out that this problem has come up in other jurisdictions, and I am thinking especially of the Eastern District of New York in Brooklyn, also in Louisiana and Missouri, and the Government practicing or following what we have been doing here has produced in the court, at least produced these reports and pointed out why in the Government's [fol. 686] opinion these should not be produced to the defendant, not to the Court, and the Court has taken the position that they could—

The Court: Have you any cases that hold that way?

Mr. Vincent: I do not have a case that is reported, your Honor, but I can quote an example in the Abel case in the Eastern District of New York. That was that espionage case in Brooklyn. The Government in that trial had some fragmentary notes made by a special agent of the Bureau. They produced those to the Court in camera, and the Court held that they were not substantially verbatim because of their nature, they were fragmentary, and, therefore, the Government could not produce.

The Court: I do not know how that came up. I want to see some case where you have come in and produced under 3500 and then that the Court on his own initiative in camera proceeding said, "This is not a statement, and, therefore, you need not produce that." I want to see a case like that, because the more I think about it the more impossible it becomes.

Mr. Vincent: I do not have it in writing, but I believe that was the procedure at least followed in part in Cleveland—Mr. Witt may know about that, that reports were shown to the Judge.

The Court: I can see an entirely different situation. You brought to me I think Saturday that case in New York or, no, in Washington the Court of Appeals which involved this security business, what is the title of the case?

Mr. Vincent: The title of that case is The Communist Party of America vs. the Subversive Activities Control Board, and that is in the Court of Appeals in the District of Columbia.

The Court: What I understand happened in that case was that while the witness was on the stand—my memory isn't too sharp—but I know in one instance it was, now, I read that the other day, that the witness on the stand was asked, "Did you ever tell this to the FBI," something about some matter, and the witness said, "I am sure I did." That happened in two instances, something substantially like that. The defense then demanded the production of the FBI [fol. 687] file or the records or whatever report this man made to the FBI. The objection was made that it was hearsay, that it, therefore, could not be used for impeachment purposes, because on the witness's own statement that the matter had been, if it was recorded had been recorded with some FBI Agent or the witness, himself, had never made a written statement on it and had never seen whatever it was recorded if anything afterwards. The court on the basis that, or the Commission I guess it was, on the basis that would be hearsay said it need not be produced to begin with. That wasn't one where they demanded it and the Government came in and said, "We have it." The Government was opposing all the time on the basis it wasn't a statement in

that sense. That wasn't the specific objection. In the course of the opinion the Court of Appeals pointed out, upheld that decision, and said even under the Criminal Code and referring to 3500 that the Government was under no obligation to produce a statement unless it came within the definition of 3500 which seems to be entirely consistent with what my view is and entirely consistent with what I have been doing here.

Mr. Vincent: I think it is more or less consistent in a sense with our own position, your Honor, but the Government was resisting production to the defendant primarily, not so much resisting production to the Court or to the Commissioner, because the Government had felt that the Commissioner or the Court could listen to the Government's position and then make a ruling on that.

The Court: Let me ask you one thing, it looks so simple to me, how in the world or by what process could the Court determine from the face of one of those instruments whether it was a statement or whether it wasn't without taking evidence?

Mr. Vincent: On some of the reports, your Honor, it is I would say obvious from its very face.

The Court: I do not follow you. It is not obvious from its very face after the thing was made it wasn't submitted to the witness and he approved it.

Mr. Vincent: Your Honor, I will take the report that Mr. Witt—

The Court: Take this very one we are talking about now. [fol. 688] Mr. Vincent: On the face of that you will notice the date of that report is October 7, 1955, and in the body on the first page of that report it states that the witness was interviewed on August 31 and September 9. Now, on its face you have more than a 30 days lapse between the interview when the witness talked to these Agents and when the report was written.

The Court: That doesn't establish a thing except by the lightest inference in my mind. For all I know they might have sat down and written out the report in its exact form right at the time. I don't know about the thing. That is the point I am making.

Mr. Vincent: We have to take the date the report was made, and, if we take the date as made and the date of the interview, we say it is not contemporaneously recorded.

The Court: I don't know. But I have ruled on that. On this other I expect the best way to do is to simply say that you are reading from this report that was submitted by the Government under Rule 3500 on page one and so forth or whatever designation there is.

Mr. Witt: All right, sir.

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[fol. 696] Mr. Kelley: The thing that bothers me, your Honor, I think I can illustrate it by this: Mr. Witt asks the witness when he first talked to the FBI, not about this case but first talked to them. Then he uses the testimony on another trial when they were talking about another subject matter to find out when he talked to the FBI in this case. Then he uses the date on which a report is made in this case which is the first report that relates to his testimony here, and you are using it in an attempt to impeach when the things are not necessarily inconsistent at all, so, that is the reason I feel that I have got to be in a position to object to the use of this stuff and not concede that it all goes, that just because we tendered it that it goes into evidence automatically or that he can use it automatically. It doesn't. Just to take the illustration that I have given, if he asks the witness a question on interrogation the witness has answered a certain way, and he conceives that some statement in here is contradictory or inconsistent with it. Then, he says, "I wish to read and offer in evidence the following sentence from page three or page five or whatever it may be of this material."

The Court: Then, you get up and say, "Well, I object to that, because there is no inconsistency or something like that." The Court will rule on it.

Mr. Kelley: We still have our objections as to relevancy and consistency and that sort of thing.

Mr. Witt: Oh, yes.

The Court: The vice to this other method under our theory before they could, just take this specific thing that we have been over, if he offers this whole page, why, 95 [fol. 697] percent of it as far as I know at the moment

would not even be relevant, and it would amount in the first instance to going in there and saying, "We offer the whole matter in evidence." That means it goes before the Jury. Probably 95 percent of it is irrelevant. There may be something in there that we would not want the Jury to see, so, we cannot do it on the basis of offering the whole thing. I think, if we proceed on the basis that I have indicated, and that is this as I understand: that the first thing we will do, you gentlemen get together and number these sheets consecutively on the back page with a red pencil in this Gardner statement, and from here on he will refer to them by the arbitrary page number and offer the portion that he thinks proper in evidence on that basis, and that I think we should have lodged so we won't get things mixed up with the thing. I think you should get the Eckert transcript that was furnished to them or this matter here and also another copy of this and put it in the record here in this case that these were, you can identify them, you can identify them however you wish to, as Exhibit 1 or 2 or something so we won't get confused with the trial exhibit, the matter that you have exhibited to them or produced to defense counsel.

Mr. Kelley: Would not a statement attached to it that these are the excised copies of reports of witness so-and-so which were furnished to the defendant—

Mr. Witt: Why don't we get together and not take your Honor's time on the rest of the problem?

The Court: I think that will keep away from difficulty on the thing.

Mr. Witt: Just to clean up two things which have now arisen.

In this last statement of Mr. Kelley's about my using the witness' testimony in Cleveland—

The Court: I think that is water under the bridge, because the witness, the witness after you refreshed his recollection, for instance, like on the date that was on the report, he said the date on the report coincided with the testimony. That is for the Jury. Then, on this other stuff I said a moment ago I didn't see any or very much of an inconsistency in that, there may be, but that is a matter of argument for the Jury on that.

Mr. Witt: But since Mr. Kelley doesn't have a copy of it, [fol. 698] of his testimony in Cleveland we will be glad to give him ours for his redirect any time he wants it.

The Court: All right.

Mr. Witt: One other thing came up that was incidental to this discussion, came up a little earlier. Perhaps I was wrong about this, but, as I understood something Mr. Vincent said, he said he showed your Honor this decision of the Court of Appeals in the District of Columbia in the case of The Communist Party against the SCAB. I am not suggesting any slightest impropriety.

The Court: Just so there will be no question about the record, why, you will recall the other day here in a conference I asked something about that case, and all that happened was without any comments or anything else one day Mr. Vincent—it was Saturday—brought me down that copy and just handed it to me. There was no argument or comments or anything else, and I had mentioned, you may recall it, that I had seen a little about the case in that Law Week, but I had not seen the opinion, and he just gave it to me. There wasn't any argument or anything else.

Mr. Witt: I didn't think so. That is why I was making my preliminary statement. If at any time your Honor is interested in discussing that case and its relevance to our problems under Section 3500, we will be happy to discuss it.

The Court: I just mentioned it because he just brought it down more or less pursuant to my request I would like to see the opinion. I never even commented on it.

Mr. Witt: I have another matter pending. This last problem we ran into with the witness that I asked your Honor for an opportunity to discuss in Chambers.

The Court: You mean about asking about other names? You can tell me what you think about that, but I do not see any relevancy at all.

Mr. Witt: Let me tell you what I am thinking, and we will be finished.

The Court: All right.

[fol. 699] Mr. Witt: If I followed the witness' answers to my questions, he said he doesn't recall talking to the FBI about Travis. He has already testified that he has talked to the FBI about Sanderson. The transcript of his

testimony in the Cleveland case indicates that he gave testimony about Ray Dennis whom he has already—

The Court: But where does that have any relevancy or anything to do with this case?

Mr. Witt: Just let me make my record, if you will. —who he has testified as being the Executive Board member of District 3 which was the district he was working in when he was in Cleveland. He has also testified he gave testimony before the Grand Jury here in Denver, and that Mr. Kelley will agree to, in connection with a conspiracy case, so, it is fair to conclude in view of what he has now said about talking with the FBI about Sanderson, who is a defendant in the conspiracy case, that he testified about Sanderson before the Grand Jury. I also conclude in view of what he said about his testimony in the Cleveland case that he gave testimony before the Grand Jury about Ray Dennis who is also a defendant in the conspiracy case. This is the conspiracy case pending before your Honor.

Since this man was in Butte at the time Graham Dolan was there, I draw the inference that, since Dolan is also a defendant in the conspiracy case, that this man gave testimony about Dolan before the Grand Jury. Finally in light of the fact that this man has now given testimony in open court here about Travis, I just think it is incredible that he never talked to the FBI about Travis. What I want to do is take him down the list of the defendants in the conspiracy case and see whether he remembers talking to the FBI or giving testimony before the Grand Jury about others of the 13 defendants in the conspiracy case, but he has no recollection about talking to the FBI or giving testimony before the Grand Jury about Travis, and I think I should be allowed to take him down through the other 13 names.

The Court: There is no relevancy between that case and this case. I mean Mr. Travis is the defendant on trial here. The other gentlemen you have mentioned are defendants in the other case, and that might be relevant in the other case, but it has no relevancy here unless it connects up in some way with this case. Whether this Sanderson business connects up with this case, he testified here on

[fol. 700] direct that he came to Denver and that among his purposes was to talk to Sanderson. Well, he has testified with respect to what he did here in Denver, and that testimony along that line may be relevant, but what he told about somebody else in an absolutely defached situation in this case, I cannot see it is relevant at all.

Mr. Witt: It is much like all the problems we had with this man Eckert, and this I think is even more acute and gives us a basis for trying to impeach the man about having no recollection about talking to the FBI about Travis. This is a case where, an occasion in giving a statement to the FBI or giving testimony before the Grand Jury in light of the fact that he has taken the witness stand here now against Travis, testimony that he did not talk to the FBI or did not testify before the Grand Jury or he doesn't remember talking to the FBI or testifying before the Grand Jury about Travis we think would tend to impeachment.

The Court: Well, that is about what—that would not make material or relevant whether he talked about Jim Smith or Joe Doaks or somebody else. That is the point I am making.

Mr. Witt: Perhaps I haven't made myself clear. If he did talk to the FBI and did testify before the Grand Jury about all or some of the 13 defendants in the conspiracy case, it tends to undermine his testimony that he didn't or doesn't remember talking to the FBI or giving testimony before the Grand Jury about Travis.

The Court: I think we would be out in most collateral and wide open field just as to whether he discussed some other person. Unless there is some relevancy to this case. I do not think it is proper.

Mr. Witt: I think my question, which is a pending question, now comes in a different category, because he gave testimony about the Buffalo-Canadian incident. I had him on cross examination because Mr. Kelley didn't go into it, and in the course of rounding out he said it was Ray Dennis who talked to him in Cleveland about going into Buffalo.

The Court: You have already asked him if there was [fol. 701] any conversation, and if he talked with them about this Buffalo conversation, but assuming, just taking your own situation as illustration, if at some other time or in

connection with something else he had mentioned something Dennis did in Los Angeles or New York City or Washington, D.C., why there would not be any relevance to that.

Mr. Witt: I agree with that. I do not intend to ask him anything about any of these people except perhaps Sanderson except whether he talked to the FBI about them or gave testimony before the Grand Jury, and then I won't pursue it any more.

The Court: Then it would immediately open up this thing, and then the next question would be if he said he didn't talk to them you would be engaged in trying to prove that he did talk to them, and that would be wholly collateral.

Mr. Witt: I had no intention this morning and I have no such intention now.

The Court: No. The record is broad enough the way it is. I will sustain the objection unless you can show specifically something that would bring it within the subject matter of his direct examination.

Mr. Witt: I follow your Honor. This I think goes to his credibility, this line. That is the basis for it.

The Court: I do not agree with that.

Mr. Witt: I think I have made myself as clear as I want to.

Mr. Witt: May I talk to Mr. Kelley a moment? We will clarify these exhibits in the record.

If the Court please, before proceeding with further cross examination of the witness, we thought we should clarify the record with respect to the use in open court of the statements pursuant to Section 3500. I have discussed it with Mr. Kelley, and pursuant to the discussion in chambers may the record—

The Court: I think I can probably correct it. The jury will recall that shortly before we recessed at noon, coun-[fol. 702] sel for the defense asked a question relative to the elementary education of the witness, and with reference to a statement made by the witness with respect thereto. At that time I sustained the Government's objection to answering the question. I since have considered that the question may properly be asked and answered, and you may proceed on that basis.

Mr. Witt: Thank you, if the Court please. With respect to that point Your Honor just made, that material in the Section 3500 statements appears in what has been marked Defendant's Exhibit J for identification, being now page 8 of the numbering we have agreed upon in chambers, so at this time I ask the Court's permission to withdraw Defendant's Exhibit J for identification and will read into the record that one sentence on the point.

The Court: Then you wish to offer this sentence in evidence and to read it into the record?

Mr. Witt: Yes, sir.

The Court: Very well.

Mr. Witt: Under heading, "Education." "Gardner completed about seven years of elementary education."

The Court: Very well.

Mr. Witt: Now, with respect to the other page of this material, that was marked Defendant's Exhibit I this morning, and I believe that was admitted by ruling of the Court over objection. At this time I ask permission to withdraw that exhibit and instead read the sentence. It is not quite a sentence; it ends with a colon, which appears on that page, that now being page No. 7, pursuant to the numbering system we agreed upon in chambers.

Mr. Kelley: May it please the Court, in view of the fact that Mr. Witt has examined him with reference to when he first talked to the FBI in connection with this Exhibit I, it seems to me that the exhibit should not be withdrawn and it should be left in, or else he should read the heading about which he has cross examined him.

[fol. 703] Mr. Witt: I will do it either way Your Honor directs.

The Court: I think probably we better leave it the way it was with respect to that transaction, because you examined him at length about that and he looked at the sentence you are talking about and mentioned the matter of reconciliation, and with that statement with his testimony to the jury.

Mr. Witt: All right, thank you, Your Honor. Now, one other preliminary matter, if I may, just to clear up the record. Also just shortly before the noon recess, although it may have been earlier, I forget, I asked one or two questions about people other than the defendant whom

the witness talked to the FBI about. I asked him about Sanderson and he answered that. Then I asked him about others. Then there was an objection. Then Your Honor either sustained it or was inclined to sustain it.

The Court: That objection will be sustained.

Mr. Witt: In connection with that, Your Honor, I simply want to complete the record from our point of view and make a short offer to prove.

The Court: The offer ought to be made in the presence of the jury or out of the presence of the jury?

Mr. Kelley: I should think it would be made out of the presence of the jury, Your Honor.

The Court: I should think so, and you can make the offer the first time we have a recess.

Mr. Witt: All right, sir. I am about to ask the witness other questions along this line, but about the defendant Travis, so I hope I won't be transgressing on Your Honor's ruling.

The Court: You ask the question.

Mr. Witt: All right, sir.

[fol. 704] Fred Gardner, resumed the stand and testified further as follows:

Cross examination.

By Mr. Witt (Continued):

Q. Mr. Gardner, do you have any recollection as to when the first trial of Mr. Travis took place in this case?

A. I have a vague recollection.

Q. What is your recollection of it?

A. It would be in '55.

Q. Any recollection as to the month or months of '55?

A. No.

Q. Now, do you have any recollection as to whether or not you had given information to the FBI of any kind before the first trial of Travis?

A. Well, not to my recollection. At least there is nothing that I have ever given that would indicate that I gave it prior or during the first trial.

Q. Then just to make sure, Mr. Gardner, I will ask you this: Do you have any recollection about the FBI's talking to you about Travis before?

A. No.

Q. Let me finish my question. —before Travis' first trial?

A. No, sir.

Q. Do you have any recollection that the FBI or any Government attorney or anybody else representing the Department of Justice asked you whether you would testify against Travis on his first trial?

A. No, sir. The first time that question was asked me was about a week ago.

Q. Well, in view of that answer, Mr. Gardner, then about a week ago you were asked whether you would testify in this trial, is that it?

A. Yes, sir.

Q. Now, in connection with your appearance before the grand jury in Denver that we spoke about this morning when you appeared before the grand jury on that occasion in this court, did you give any testimony about Travis?

Mr. Kelley: The Government objects to that as being irrelevant.

The Court: I will sustain the objection.

Q. Now, Mr. Gardner, you remember being asked questions in Cleveland when you testified there the week before last about your having given information to the FBI? I asked you about that this morning?

A. Yes.

[fol. 705] Mr. Vincent: If Your Honor please, the Government objects to that; that is improper.

The Court: I will sustain the objection unless it is—

Mr. Witt: Preliminary.

The Court: —unless it is directed to something that would pertain to this trial. If he was asked in Cleveland and if he gave information to the FBI about some specific matter there under investigation and he hasn't testified to the same subject here, it would be entirely irrelevant.

Mr. Witt: Well, Your Honor, this is preliminary. I just wanted to complete the record I started to make this morn-

ing on his recollection on talking to the FBI about anything, just fix the dates, that's all I am interested in. Then I want to narrow it to what he testified to on direct in this trial.

The Court: He may have talked with the FBI twenty years ago about a post office robbery, for example; that would have no more connection with this case than anything you could possibly conceive. There has to be something developed here that would show that the subject of the testimony was the same as here, because the purpose, of course, is to go to the weight to be given his testimony here, and the testimony you are talking about has to relate to something that he has testified to on direct examination.

Mr. Witt: All right, Your Honor. I will have to ask one or two preliminary questions, but I am following Your Honor's ruling, I hope.

The Court: All right.

By Mr. Witt:

Q. Mr. Gardner, where are you living at the moment?

A. In Anchorage, Alaska.

Q. And you are there in connection with your work for the hod carriers?

A. Yes, sir.

Q. Did you furnish information to the FBI in Anchorage, Alaska at any time within recent months?

Mr. Kelley: The Government objects to that as having no materiality.

[fol. 706] Mr. Witt: I didn't want to make the question too complicated.

The Court: That may be a preliminary question.

Mr. Witt: I thought we would make it simpler; it is preliminary.

The Court: About what?

Mr. Witt: I am coming to it.

The Court: I think I will sustain the objection then; if you can point it up, you may.

Q. At any time within recent months since you have been in Anchorage, Mr. Gardner, have you given any information to the FBI about Travis?

A. No, sir, not that I recall, none at all.

Q. When did you go to Anchorage?
A. I believe it was last July.
Q. That's July of '57?
A. Yes.
Q. At any time since you have been in Anchorage did you give the FBI any information about Mine-Mill?

Mr. Kelley: I think that's irrelevant; he has answered that he gave none about the defendant, and I think it is irrelevant.

The Court: I think I will sustain the objection.

Mr. Witt: This is impeachment. I want to narrow it down. All right, Your Honor, I won't argue the point.

By Mr. Witt:

Q. At any time since you have been in Anchorage have you given the FBI any information about Harold Sanderson?

Mr. Crandall: The Government objects to that, Your Honor. We don't see the relevancy in this case.

The Court: I don't see the relevancy of that at all. Mr. Sanderson's name was brought in here because of the witness on testimony on direct examination. He saw Mr. [fol. 707] Sanderson in Denver, and I don't see how any conversation with anyone would have any relevancy to that unless it is tied to this Denver transaction.

Mr. Witt: It is.

The Court: And the breadth of the question is such that it might relate to something else. If you wish to ask him about the conversation, a specific conversation in Denver or something like that, why, you might do that, but I will sustain the objection to the question in the present form.

Q. Mr. Gardner, at any time since you began to give the FBI information did you give the FBI any information relating to your seeing Sanderson or talking to him when you stopped in Denver in June of 1953?

The Court: I think he has answered that question this morning; I am sure he did.

Mr. Witt: I don't remember.
Mr. Kelley: Yes, he did.
Mr. Witt: What was his answer?
The Court: I am telling you for the record. I won't attempt to give it, but you asked several questions about that.

By Mr. Witt:

Q. All right; now, in talking to the FBI about Sanderson and seeing him here in Denver, did you tell the FBI what you and Sanderson talked about?

Mr. Kelley: May it please the Court, I think he is approaching it in a way we have agreed isn't proper. If he has a specific report that has an inconsistent statement in it he is to ask him about that.
The Court: I think that's true.
Mr. Witt: I thought I would ask him a preliminary question first.
The Court: If I am wrong we can stop and look at the [fol. 708] record if there is any question about it. I think the witness testified this morning that he had a conversation with Mr. Sanderson here in Denver and that the FBI interrogated him about his meeting with Sanderson in Denver. That's what he testified to this morning. Now, if you have anything that would show any inconsistency in his testimony you can ask him a specific question, not go into the subject of the conversation.
Mr. Witt: May I try to fix the date and the times?
The Court: Yes.

By Mr. Witt:

Q. Did you talk to the FBI about that matter on one occasion or more than one occasion?
A. I can only recall one occasion in which there was a discussion.
Q. Can you fix the date of that discussion?
A. Gee, I don't know how to fix the date on that occasion because I don't know which one, which time, which meeting it was at which that particular subject was discussed.
Q. Mr. Gardner, you testified the other day that when

you got into Denver in June of '53 you went to the office; you remember that testimony?

A. Yes.

Q. And you testified you saw Clark and Sanderson there?

A. That's correct.

Q. And then you went to Travis' home?

A. That's correct.

Q. Did you leave Denver the next day after spending the night at Travis' home?

A. Yes, sir.

Q. Will you tell us whether you saw anybody connected with Mine-Mill aside from Travis the next day, the day you left Denver, before you left Denver?

A. I don't recall whether I did or not; I remember leaving from Travis' house.

Q. You left from Travis' house?

A. Yes.

Q. So you didn't go to the office first before you left Denver, is that right?

A. No, sir.

Q. Then the only time you saw Sanderson when you stopped in Denver on that occasion was when you stopped in the office on the day you arrived in Denver, is that right?

A. Yes, sir, that's right.

Q. Now, you said, if I recall, in testifying about your stopping in Denver last week, you said it was early in June of 1953?

A. Yes, sir.

Q. Can you fix the date more exactly?

A. I know it was early in June. I think I got into the [fol. 709] Couer d'Alene, to the best of my recollection roughly around the 15th of June, so it would be the difference between that time and what it would take to drive up there. I stopped in Cheyenne, and I believe in Billings—Cheyenne and Helena, and then into the Coeur d'Alene the following day.

Mr. Witt: May I have this marked for identification please?

(Defendant's Exhibit K was marked for identification.)

Mr. Witt: I want to show this to Mr. Kelley, if the Court please.

Q. Mr. Gardner, I show you Defendant's Exhibit K for identification and ask you whether you recognize that document?

A. Well, it looks like an expense voucher.

Q. Does it look like your own expense voucher for the semi-monthly period ending June 15th 1953?

A. Yes, it does.

Q. And that's your signature at the bottom of it?

A. It looks like it.

Q. Does that show the date in June '53 when you arrived in Denver and the date when you left Denver?

A. I think it does.

Q. What's the date?

A. The date is June the 11th.

Q. That's when you arrived in Denver?

A. Yes.

Q. From Fort Morgan?

A. Yes.

Q. When did you leave Denver for Cheyenne?

A. On the 12th.

Q. The next morning?

A. Yes, I think it was about noon the next day that I left.

Q. Do you remember about what time it was on June 11th that you arrived in Denver?

A. Well, it was in the morning; it was before noon, or around noon, I believe. I wouldn't be too sure of that, but it occurs to me that it was about lunch time.

Q. Do you remember where you had lunch that day, you and your family?

A. No, sir.

Q. Your wife and three children were with you?

A. Yes, sir.

Q. Three boys you had at that time?

A. Yes.

Q. And still have?

A. Yes.

Q. How old were the three boys at that time?

Mr. Vincent: If Your Honor please, we see no materiality in this.

[fol. 710] Mr. Witt: It is just preliminary. All right, I will withdraw it; it is not too important.

Q. Do you remember whether you went up to the Mine-Mill office before lunch or after luneh?

A. I don't remember; I think it was about lunch time. To the best of my recollection—I could be dead wrong on it because I can remember being up in the office—but I don't remember the time of day. The sun was shining, and that's what I know.

Q. You said the other day and just awhile ago that when you went into the office on that date, June 11th, you saw Clark and Anderson?

A. Yes.

Q. Did you see anybody else in the office?

A. Well, there were office girls there, and I believe there was somebody back in the back rooms, but I don't recall talking to anybody else.

Q. So that your present recollection is that the only people you talked to when you stopped in the office on that day were Jack Clark and Harold Sanderson, is that right?

A. Yes, to the best of my recollection. I probably talked to the telephone girl on coming in.

Q. Was Travis in the office?

A. No, sir, he was not.

Q. Do you recollect where he was?

A. Sir?

Q. You recollect where Travis was?

A. Well, they told me he was home and they sent me to his home later, and he was there when I got there.

Q. Who told you he was home?

A. Sanderson.

Q. And did Sanderson then tell you that Travis was prepared to put you and your family up that night?

A. Not to my recollection he didn't.

Q. Well, Sanderson merely sent you to Travis' home?

A. Yes.

Q. Without you knowing what you were going—

A. I know I knew what I was going there for. He told me I was going there to get a briefing on the Coeur d'Alene situation in the Coeur d'Alene.

Q. But he didn't tell you you would stay overnight?

A. No, sir.

Q. That happened after you got out to Travis'?

A. To the best of my recollection.

Q. When you testified the other day about dropping in the office, did you testify then that Sanderson told you to go to Travis' home?

A. If I was asked I did; I don't remember if I was asked.

[fol. 711] Mr. Kelley: You will find it on 972 at the top of the page, Mr. Witt.

Mr. Witt: Mr. Kelley is right, page 972.

The Court: What is the point? He wasn't asked about it, was he?

Mr. Witt: I just wanted to get the continuity. I will skip it, Your Honor; it is not too important.

Q. Did you exchange greetings with Sanderson?

A. Oh, yes.

Q. Aside from telling you to go to Sanderson's home—to Travis' home—and you would get a briefing, do you recall anything else Sanderson told you? A. Oh, I think he, very, very briefly gave me a picture of the Couer d'Alene in pretty much the same manner as Travis did, except not in the great detail that I had got it at Travis'.

Q. Now, after he gave you that brief picture of the situation of Couer d'Alene, he suggested you go out to Travis' and Travis would fill you in more on that situation, am I right?

A. Yes, that's right.

Q. Now, did you at any time since you have been furnishing information to the FBI tell the FBI about that talk you had with Sanderson in the office in Denver on June 11, 1953?

A. Well, it occurs to me that I did, although I could be wrong, but I vaguely remember some discussion relative to Sanderson, and in connection with that I believe I mentioned that talk, although I don't want to be too sure of it because I just don't remember the details.

Q. Do you remember whether the FBI asked you about that occasion?

The Court: You have been over this, Mr. Witt.

Mr. Witt: I have to connect it up; I will try to shorten it, Your Honor.

The Court: Go ahead, but I am positive that you have gone over these very same questions and answers.

Mr. Witt: It doesn't matter.

[fol. 712] The Court: Go ahead.

Q. Do you recollect whether you talked to the FBI about that conversation with Sanderson, do you recollect that whether you also talked to the FBI about your subsequent conversation with Travis the same day?

A. I don't recall it, because as I recall the discussion it had to do with Sanderson and not with Travis. Now, I might have incidentally mentioned that I seen Travis that day, but I do not recall at that time having any discussion with the FBI relative to Travis.

Q. Now, you have no recollection of when it was you might have told the FBI about this conversation with Travis?

A. No, sir, I don't.

Mr. Witt: If the Court please, based on our discussion in chambers about the procedure in connection with these statements, Your Honor, I now want to read into the record from page five, using the system of numbering we have agreed upon of the statements furnished the defense pursuant to Section 3500. Page five seems to be one page of a continuous document which begins on page three.

Mr. Kelley: Before you start reading I want to make an objection.

Mr. Witt: All right.

Mr. Kelley: Are you through?

Mr. Witt: No, I am not.

Mr. Kelley: I mean, with your preliminary—

Mr. Witt: Yes, I was about to read.

Mr. Kelley: The Government objects for the reason that first there is no inconsistencies in the material that he is offering, and it would just tend to clutter up the record.

The Court: Let me see what it is.

Mr. Kelley: I would like to show you the statement he is referring to (handing document to the Court).

[fol. 713] The Court: It goes only to his credibility and he has already testified that he had a conversation with Mr. Sanderson relative to the situation in the Idaho area, and this is not inconsistent with that statement.

Mr. Witt: No, Your Honor, may we discuss this at the bench?

The Court: All right, what is the reason?

(Discussion at the bench out of the hearing of the reporter and the jury.)

The Court: I don't see the point anyway. I haven't heard anything that would go to the weight of his testimony about the dates on this. Where is there anything that would be—

(Discussion at the bench out of the hearing of the reporter and the jury.)

The Court: Let the record show that you propose to read the matter appearing at the bottom of page five of the material furnished by the Government. That's the red mark "5" which is page four of another document. You propose to read that in the record?

Mr. Witt: That's right.

The Court: The Court has examined that and sees nothing in the statement contained in the matter you offer that is any way inconsistent with the witness' testimony or that would in any way go to the weight of the witness' testimony, and therefore the objection of the Government would be sustained.

(Discussion at the bench out of the hearing of the reporter and the jury.)

The Court: I am making my ruling on the record. That will be the way it is, because this matter will appear in the record in the form it is submitted, and I have clearly identified what you propose to read, and I have said that I thought it was not relevant or material or any proper matter to be submitted to the jury, and have ruled accordingly.

[fol. 714] By Mr. Witt:

Q. Mr. Gardner, your present marriage is your second marriage, isn't it?

Mr. Kelley: May it please the Court, that is irrelevant to the issues here.

The Court: I didn't even hear the question.

Mr. Kelley: He asked about his marriages, whether his present one was his second marriage or not.

The Court: I will sustain the objection.

Mr. Witt: I would like to make an offer of proof on this. There is materiality on that in these statements.

The Court: You can say it right now, can't you? What is the materiality?

Mr. Witt: To show that this man furnishes or gives contradictory testimony, to show that if the information which he furnished the FBI about his marriages contained on our page eight, if that's so, this man committed bigamy when he married his present wife.

Mr. Kelley: May it please the Court, I move that the statement of counsel be stricken.

The Court: I asked counsel to state his reason, and as I understand he claims there is some inconsistency in what the witness, if he answered this question, and some other matter. I don't quite understand what the problem is.

Mr. Kelley: I don't understand the problem, but his allegation, I think, should be stricken from the record.

Mr. Witt: The Court asked me. Does Your Honor want to see this first?

Mr. Kelley: This certainly doesn't prove anything.

The Court: What isn't apparent to me is whether there is anything to go into about it.

[fol. 715] Mr. Witt: That's what I have said; Mr. Kelley objects to it. According to this FBI document—

The Court: You haven't asked any question that relates to it. What was the question asked?

Mr. Witt: The question was whether this was the second marriage preliminary to putting this in evidence (indicating).

(The reporter read from his notes as follows:)

"Q. Mr. Gardner, your present marriage is your second marriage, isn't it?"

The Court: He can answer the question.

A. Yes.

By Mr. Witt:

Q. Did your first marriage terminate by divorce?

Mr. Vincent: If Your Honor please, the Government objects; it is irrelevant and immaterial.

The Court: No, let him answer the question.

A. Yes.

Q. When?

A. I think in 1946.

Q. When did you marry your present wife, your second wife?

A. In 1946.

Q. What month in '46?

A. November.

Q. What month in '46 were you divorced from your first wife?

A. March, I believe.

Mr. Witt: All right, Your Honor, I now want to read into the record two paragraphs—I am sorry, may I have those last two answers read back before I offer this?

The Court: All right.

(The reporter read from his notes the last three questions and answers.)

The Court: Now, what is inconsistent in that statement, Mr. Witt?

[fol. 716] Mr. Witt: According to this information he gave the FBI his current marriage was contracted in November, '45 and he was divorced from his wife in '46.

Mr. Kelley: The whole fallacy is that we proceed on the assumption that the report doesn't contain typographical errors or any other kind of misstatements, that this witness has not seen or approved of any of the information that is in there, and that's the thing that makes it wrong.

The Court: There may be an obvious typographical error in there which this morning you called attention to in one of these reports. I see no inconsistency except as a result of that typographical error.

Mr. Witt: There is no evidence in this record except Mr. Kelley's statement that it was a typographical error. We got this document from the Government, and we supposed the Government goes over it, and besides if we impeach the witness, if the Government has some evidence on redirect which will rehabilitate him to the effect, for example, that that's a typographical error—

The Court: I think it is getting down to the tweedly-dee and tweedly-dum stage. I noticed this morning without any hesitancy when you were reading a transcript of the Cleveland proceeding that you called attention to a typographical error, and I think the second sentence here may be read to the jury, and the jury can consider the testimony of the witness. The motion as to the first sentence will be sustained.

MOTION FOR MISTRIAL AND DENIAL THEREOF

Mr. Witt: If the Court please, I now move for a mistrial because of what your Honor just said, the reference to a typographical error this morning from the Cleveland transcript. It was obviously a typographical error on the face of that document, your Honor, because you will recall at that point in his testimony in the Cleveland case. The witness was being interrogated about the 50's, and counsel misspoke himself in examining the witness and referred to the 40's. Here there is nothing on the face of this document of that character, and I think—

The Court: You can read the sentence.

[fol. 717] Mr. Witt: I think your Honor's comment is improper.

The Court: The jury will be the ones to judge whether it is a typographical error or not.

Mr. Witt: "Gardner married Charlotte Fischer, of Brooklyn, New York in 1936 at New York City and was divorced from her in 1946 at New York City."

The Court: I may have the thing twisted around. Let

me see that statement again. I think you can read the first sentence also. I looked at the thing.

Mr. Witt: All right, sir. Suppose I read them both.

The Court: Go ahead and read it.

Mr. Witt: Does your Honor want me to read them both?

The Court: You can read that sentence. I think that will be sufficient.

Mr. Witt: The first sentence?

The Court: Yes.

Mr. Witt: "Gardner is currently marred to Leonida Lucia Theresa (Bergamini) Gardner, whom he married in November 1945, in Minneapolis, Minnesota."

The Court: I think I did not rule on this motion for mistrial. The record can show its denial.

Q. Mr. Gardner—strike that. Did you ever live and work in New York City?

A. Yes, sir.

Q. When did you first come to New York City to work?

A. 19—about 1930, 1929 or 1930.

Q. You say about 1929 or 1930?

A. Yes, in that period. It was at the beginning of the depression.

Q. So, it could have been '31-'32?

A. No, I think it was probably 1930, may be 1929.

Q. Let me know when you are finished.

A. You can take your choice. To the best of my recollection it was 1929 or 1930.

[fol. 718] Mr. Kelley: Now, the question is a little vague to begin with. He refers to New York; there is New York State and New York City.

Q. You understood me to be referring to New York City?

A. Yes, I did, although I came to New York State prior to 1929.

Q. You understood my question. If there is any doubt, Mr. Gardner, my question was when it was that you first came to New York City.

A. It was either 1929 or 1930, and I don't remember which.

Mr. Vincent: If your Honor please, the Government fails to see the relevancy of this line of questioning.

The Court: I do not know, of course, what he is leading to.

Mr. Witt: If the Court please, I propose to read into the record in connection with this question as to when he first came to New York City from page 10 and page 13 of the statements given to the defense under Section 3500.

Mr. Kelley: May it please the Court, there is nothing here that says anything about when he went any place.

The Court: Let's see what you are talking about reading.

Mr. Kelley: It doesn't purport to give that information.

The Court: What is it you want to read?

Mr. Witt: Your Honor, this gives the residences, it says former residences on this page, and then I want to show, if the Court please—

The Court: What page?

Mr. Witt: Page 10.

The Court: What is it you want to read?

Mr. Witt: Just that line that he lived the balance of '30 to November '37, your Honor—

[fol. 719] The Court: Didn't he just testify to 1929?

Mr. Witt: I have an inconsistency on another page here, page 13. I want to offer them both together, so the material from these statements will all be in the record. It has a sentence in that paragraph which says he had come from Chicago, Illinois, to New York City in 1935 to seek employment.

The Court: I don't think there is any inconsistency unless you call attention to the matter. You have pointed out here this which is the second item on page 10 and the last line of the first paragraph of page 13. The objection will be sustained.

Mr. Witt: Not the last line of the first paragraph.

The Court: The last line in the first paragraph on page 13 I said.

Mr. Witt: All right, sir.

Q. Now, Mr. Gardner, will you tell us what your first job was in New York City?

Mr. Kelley: The Government objects to that as being irrelevant, no material value in this case.

The Court: You can answer if you can recall.

A. The first job that I can recall getting was with the Department of Hospitals as a general roustabout or laborer. I was assigned, I believe the first place I was assigned was Morrisania Hospital.

Q. When did you begin working there, Mr. Gardner?

A. I don't recall. It was probably shortly after I got to New York. It has been a long time ago.

Q. About when was that?

A. I suppose 1930.

Q. Until when did you work there?

A. I imagine until about 1934.

Q. Then your best recollection is that you had a job for about four years?

A. Three or four years. That is pretty hard to remember.

Q. Do you remember being asked how long you worked on that job when you testified before Senator Watkins in Cleveland in 1952?

[fol. 720] The Court: He need not answer that question. If you think it is inconsistent, you can read the question and answer, and the jury will draw their own conclusion and not tax his recollection here twice as to what he testified to and what the fact is, both.

Mr. Witt: All right, sir.

Q. On page 70 of the hearings before Senator Watkins at the bottom of the page Mr. Arens asked the following question and Mr. Gardner gave the following answer: "Mr. Arens: Give us, if you please, a brief resume of your employment activities. Mr. Gardner: Well, in my youth I worked on farms and in canneries. It has been a long time ago, and I can't remember in detail. Mr. Arens: Of course, we would not expect you to." At the top of page 71 appears Mr. Gardner's answer: "I worked for the City of New York for approximately seven years."

The Court: Where is there anything inconsistent with what he testified to?

Mr. Witt: He said he worked for the City of New York at the hospital.

The Court: You stated the difference. He might have been working for the Police Force.

Mr. Witt: I am coming to that.

The Court: Go to it first.

Mr. Witt: But he never said on other occasions that he worked for the Police Force.

The Court: He said he worked for this hospital three or four years.

Mr. Witt: I will ask him.

Q. Mr. Gardner, did you work for the Police Department in New York City?

The Court: The Court used that simply as a matter of illustration.

[fol. 721] Q. Mr. Gardner, aside from the job at the hospital did you have any other job with the City of New York?

A. Not that I recall.

Q. Did you—strike that.

Mr. Witt: Now, in connection with the same answer, if the Court please, I now propose to read from page eight of the statements furnished to the defense under Section 3500. I will point this out to Mr. Kelley at the bottom of the page, just one line. I will wait to see if Mr. Kelley has an objection.

Mr. Kelley: Yes, I have an objection. First, the Government objects for the reason that this is not anything that the, it is not a statement within 3500. The witness has had no opportunity to examine or adopt it, and secondly, it is not inconsistent with his testimony on cross examination. It is irrelevant to the issues in this case. It is a side issue.

The Court: Let me see it.

Mr. Witt: Referring to that line about his employment with the hospital.

The Court: I think the objection will be overruled, and he can read it.

Mr. Witt: This is under the general heading on that page "Employment History", and after listing one other employment this is what I want to read into the record. "February, '30-June, '36," that is under the heading "Dates", then under the heading "Employer" is the "Morrisania Hospital", and under the heading "Location", "Bronx, New York," and under the heading of "Position" —"Attendant".

Q. What was your job after the job at the hospital?

Mr. Kelley: May it please the Court, it seems to me this is not the proper way to test a man's credibility. We object to it as irrelevant.

The Court: The only possible purpose would be to some contradictions or some inconsistency in the defendant's testimony that would reflect upon his credibility. It has no relevancy to the transaction here. Technically, probably [fol. 722] the matter in some degree is at variance, and, of course, the jury are the judges as to whether the variance is branded something inconsistent or something of that nature. I will sustain the objection to this question unless it is made more specific. I mean just taking a person down the line about where he worked or where he was on such and such a date you can ask him specifically fixing some time so that the witness will have something to go by as to when you are talking about.

Mr. Witt: I am sorry, your Honor, that destroys the purpose of this attempt to impeach his credibility. I fixed the time, and I don't think it could be more specific in terms of a normal witness. I asked him what his job was after his job at the hospital to which he testified. On the witness stand here he said that job lasted until 1934, I think he said 1933. So, he knows the time I am asking about.

The Court: I think I will let him answer if he recalls.

A. The best I could recall, that is a long time ago, and it is very difficult to give a real accurate answer, to the best of my recollection I went to work for the United States, that is, the United Electrical Radio, and Machine Workers in the summer of 1936. Now, prior to that I had been employed for a period of time with the Department of Hospitals and then a union that was connected with the employees in the Department of Hospitals, and just for my own benefit and to make this answer clear I remember that the Communist Party directed us to form a union in the hospital field in which I was working in 1933. Now, as I recall it, I continued my employment with the hospitals for a period of time after that, and then for a brief period of time I worked as a full-time officer of the union in that field and then went to work

for the United Electrical, Radio, and Machine Workers of America which I think was about 1936 that I went there. Now, I could be a year off one way or the other. That is the best of my recollection of it, the events leading up to my employment in that very early period.

Q. Are you finished?

A. Yes, sir.

Mr. Witt: I move that that part of the witness's answer about the Communist Party directing his employment be stricken from the record.

[fol. 723] The Court: The motion will be denied, and the answer will stand.

Q. Now, Mr. Gardner, didn't you give testimony about your work during that period with this union you just referred to when you testified the week before last in Cleveland?

Mr. Kelley: If the Court please, that is irrelevant.

The Court: I will sustain the objection. If you wish to ask specific questions, you may.

Mr. Witt: All right, sir.

Q. First, what was the name of that union referred to connected with the Hospitals?

A. The Building Service Employees International Union and, as I recall it, that was Local 171 that I was connected with.

Q. You said you had that job for a previous period. Can you fix that period now before I go to the—

A. We formed the union in 1933 and—

Q. Mr. Gardner, just tell me when you worked for the BSEIU as an organizer.

A. I worked for them from the time it was formed, but I also worked at the hospital too. During that period—

Q. Give me the dates.

A. I tried to. From 1933 to 1936 is the best of my recollection. Now, again, to complete that answer, a lot of that time was spent at the hospital, but I was still an employee of the local union.

Q. All right, now, Mr. Gardner, I will ask you whether you don't recall the following answers you gave to the

following questions when you testified in Cleveland recently on January 14. I am referring, Mr. Kelley, to pages 686 and 688, at 686, this is on direct examination:

"Q. Now, will you tell us beginning with the first one which trade union organizations you were associated with?

"A. Well, the first one I was associated with was the Building Service Employees International Union, New York City.

"Q. All right.

"A. In the early '30's."

Page 688:

"Q. And how long did your connection with the Building Service Employees International Union last at that time?

"A. Probably about a year and a half, as best I can recall."

[fol. 724] Mr. Kelley: May it please the Court, I move that that be stricken. It has no probative value here; it is consistent with what he said and what he is doing is cross examining him at this time upon answers he gets on cross examination with material that he gave at another time. He is not cross examining him as to his testimony on direct; it is improper cross examination.

The Court: I don't observe the inconsistency.

Mr. Witt: Your Honor, I am going to give him now all the statements—

The Court: You were just going over the same thing with no inconsistency in the statements at all.

Mr. Witt: Will Your Honor bear with me a minute on this and I will give him other material and then ask him whether he didn't give other answers?

The Court: No, the jury will disregard this part of it, at least as far as we have gone, because there is no inconsistency apparently on the face of it.

By Mr. Witt:

Q. All right, Mr. Gardner, page 71, I will ask you whether you recall being asked the following questions and giving the following answers when you appeared before Senator Watkins in Cleveland in 1952, after talking about your work in the hospital.

"Mr. Aarons: All right, sir, go ahead, if you please.

"Mr. Gardner: And I worked for the American Federation of Labor.

"Mr. Aarons: In what capacity?

"Mr. Gardner: As an organizer.

"Mr. Aarons: At about what period?"

The Court: What does that have to do with this?

Mr. Witt: The next answer when he gives the dates: [fol. 725] that's the same job he is talking about.

The Court: What is the connection between that answer and his testimony here in this court?

Mr. Witt: That's the same job I have just been asking him about, and he is giving the dates in the next answer.

The Court: I don't know that it is—

Mr. Witt: I will ask him; if there is any question I will stop now.

Q. Mr. Gardner, when you said you worked for the American Federation of Labor when you were before Senator Watkins, were you referring to this job you had with the BSEIU?

A. Yes, sir, I was, but there is also one important thing about that. I was under Communist Party instructions not to cooperate with the Senate Internal Security Committee, and I certainly did everything possible to avoid giving any accurate information, in line with the Communist Party's position at that time, and as far as I know up to the time I expelled from the party.

Mr. Witt: If the Court please, I move that everything the witness just said after he answered my question that has reference to the AF of L was the same as his reference here to the BSEIU, I move that all of that be stricken from the record.

The Court: The remainder of the answer will be stricken. That will develop when you ask him the question, I assume.

Mr. Witt: I don't think that is correct, Your Honor.

The Court: If there is any.

Mr. Witt: He may want to go into that on redirect. I also ask that the jury be instructed to disregard everything the witness said after he answered my question.

The Court: I have already said it will be stricken, and

th jury will disregard the answer except for the fact that this union was connected with the AF of L.

[fol. 726] Mr. Witt: No, sir, I asked him whether when he—I withdraw that.

By Mr. Witt:

Q. Now, continuing: "Mr. Aarons: In what capacity?

"Mr. Gardner: As an organizer.

"Mr. Aarons: At about what period of time?

"Mr. Gardner: As near as I can recall that was probably 1935 to 1937."

Mr. Gardner, do you recall giving the FBI information about your job with the Building Service Employees International Union?

A. I don't recall specifically.

Mr. Witt: If the Court please, I propose to read one line from the statements furnished to the defense pursuant to Section 3500 on page 8, which is the line after the one I have already read about his job in a hospital in the Bronx.

Mr. Kelley: The Government has the same objection as stated.

The Court: All right, the objection will be overruled.

Mr. Witt: This is page 8, as I said, under the same heading, "Employment History," under the column, "Dates, June '36-1937," under "Employer, AF of L," under the heading, "Vocation, New York City," under heading, "Position, Organizer."

Q. I will ask the witness now that he has heard that whether he remembers telling the FBI about that?

A. No, and I am sure I am not responsible for any statements that they might have thought they heard or dates that they thought they heard in telephone conversations, or otherwise.

Q. At any time that you have given information to the FBI have you been under orders from the Communist Party to mislead the FBI?

A. (No response.)

Q. Will you answer that question?

A. I don't understand your question. I think it was—

[fol. 727] Mr. Kelley: I think it is immaterial and irrelevant.

The Court: The witness says he doesn't understand the question.

Mr. Witt: All right, I will withdraw it.

Q. Now, did you already say—I think you did—that your next employment after your job with the BSEIU was with UE?

A. Yes, sir.

Q. And you said that was in '36 or the summer of '36?

A. I think roughly around the middle of '36 I first went to work for what was then District 12.

Mr. Witt: Now, in connection with that answer, Your Honor, I have indicated to Mr. Kelley that I propose to read into the record from page 8 of the statements furnished the defense pursuant to Section 3500 the reference to that matter which appears at the very bottom as the last item on that page.

Mr. Kelley: We have the same objection to that that we have to all this line of testimony.

The Court: I will overrule the objection.

Mr. Witt: This is under the same heading on that page, "Employment History," in the column entitled "dates, 1937 until about November, '37." Under the column entitled, "Employer, United Electrical Radio & Machine Workers of America, CIO." Under heading, "Vocation," in that column, "New York City." Under the heading of "Position" in the last column, "Organizer."

Q. Do you remember testifying on the stand here last Thursday on direct examination that you were an International Representative of the UER & MW from 1936 to 1950?

A. Yes, sir, and that might be inconsistent only in the sense that for a period of a few months I worked for District 12 as a district organizer and then went on the international staff of the Union, and I believe in 1937—it could have been late in 1936—and continued in there until 1950.

Q. Do you remember testifying about your work with the UE when you appeared before Senator Watkins?

A. I don't remember anything specific.

The Court: You can ask him if he answers that question—

[fol. 728] Q. Did you give the following testimony when you appeared before Senator Watkins in Cleveland, April, 1952, page 71: "I worked for the United Electrical Workers from 1937 to, I believe, 1949"?

The Court: Where is the inconsistency?

Mr. Witt: Your Honor, he said last week on the witness stand here he worked for them until 1950, and he said on the witness stand here last week that he began working for the UE in 1936, and he told Senator Watkins in 1937—I have already read into the record what he told the FBI, or at least what the FBI document shows that he worked from '37 to late '49, and he testified under my cross examination this afternoon that he began working for them in the summer of '36 or in the middle of '36.

The Witness: I am here attempting to give accurate information. On some of those it was a guess that was all that was needed, and if I guessed wrong by a few months, I think that's not too bad.

Mr. Witt: I am sorry, Your Honor, just a moment; I apparently have the wrong reference.

Q. Mr. Gardner, page 71, Senator Watkins, continuing with your answers to Mr. Aaron in Cleveland before Senator Watkins in 1952 about your employment, I will read the rest of that answer, part of which I read a little while ago, page 71:

"Mr. Gardner: I worked for the United Electrical Workers from 1937 to, I believe, 1949. I am not too sure there. I think it was 1949. I worked for the Ward Products as a factory worker from 1950 to sometime in 1951 when I worked for the Mine-Mill & Smelter Workers."

Was that answer you gave in response to Mr. Aaron's question a correct answer?

Mr. Kelley: May it please the Court, I think the proper question is whether or not that is the answer he gave at that time.

The Court: That's right.

[fol. 729] Q. Is that the answer you gave at that time?

A. To Senator Watkins?

Q. Yes.

A. I believe that it could have been; I don't remember what I said there. I don't even remember the specific questions, but if it is in the book it probably is so.

Q. Now, did you at any time when you appeared before Senator Watkins on that occasion give testimony that you worked for the Union Carbide Company between the time you worked for the UE and the Ward Products Company?

The Court: I will sustain the objection.

Mr. Kelley: The Government does object to it, Your Honor.

The Court: I will sustain the Government's objection.

Mr. Witt: All right, then, if the Court please—

The Court: There has to be something before you use any contradictory material to contradict, so there has to be some foundation laid before you can use any material that you think has a tendency to contradict the witness. What is it now we are talking about?

Mr. Witt: I now propose to show from a statement furnished—

Mr. Kelley: You haven't asked him about whether he has ever made the statement or not.

Mr. Witt: The statement of the FBI?

Mr. Kelley: If he made it to Senator Watkins' committee.

The Court: Did he say anything inconsistent with it?

Q. Did you ever tell the FBI about some other job that you had between the time that you left the UE and the job you had with Ward Products?

A. If they asked me I told them; if they didn't ask me I probably didn't tell them.

Q. Do you recall whether they asked you?

A. I don't recall.

Mr. Witt: If the Court please, I propose—

[fol. 730] The Court: No, call his attention to what you claim he said; you can ask him. You needn't show it to him; ask him if he said such and such.

Q. All right; when you furnished information to the FBI in Butte did you tell the FBI that from late '49 until September, 1950 you worked as an official of Union Carbide Chemical Company in Ashtabula, Ohio?

A. Oh, no, I very definitely did not. If that is there that's what they might have thought was said, but I definitely did not make any such testimony anywhere that I was an official of the Union Carbide & Chemical. I was employed by the Union Carbide for about fifteen minutes one morning, maybe a little longer.

Q. When was that?

A. Oh, that was at the same time I went to work at Ward Products. It might have been during a brief lay-off at Ward Products, or it might have been the day before I went to work at Ward Products, but I definitely was never an official of the company.

Q. And you definitely—

A. And my work there was so brief that you would certainly have to call it to my mind to make me remember it.

Q. But, you said if I followed you a minute ago that you worked there for only fifteen minutes?

A. Well, I don't know how long it was; I was down in the furnace room a short time; actually I don't remember. I don't think it was very long.

Q. When you say "not very long" you mean—

A. It could have been a day or two.

Q. But no more than a week?

A. No.

Q. So that—

A. I doubt seriously if it was a week, just a flash back of memory, I can't remember working there a week.

Q. Just so you will complete your answer and search your recollection, do you recollect whether you worked there for a period closer to fifteen minutes or closer to a full week?

A. No, it was probably a day or two.

Q. Then this statement in this FBI document, aside from the word "official" as far as the dates are concerned when it states that you worked for Union Carbide from late '49 to September, 1950 does not reflect the actual facts as you recall them?

A. Oh, no, very definitely not. They are all mixed up on that one, if that's what it says. I have never seen it so I don't know what it says.

Q. You never saw that?

A. No, sir.

Q. Didn't the Government show you that statement in the [fol. 731] FBI report before you took the witness stand last week?

A. The only thing the Government has shown me before I took the witness stand was a bunch of documents that you got from Cleveland; I didn't have a chance to finish those even.

Q. Did you leave that short job with Union Carbide or were you discharged?

A. No, sir, I—

Mr. Kelley: The Government objects to that; it is improper cross examination.

The Court: I will sustain the objection.

Mr. Kelley: It makes no difference.

Mr. Witt: If Your Honor pleases, I am going to a different subject aside from his employment now. I wonder whether you would consider a recess now?

After Recess

FRED GARDNER, resumed the stand, and testified as follows:

Cross examination.

By Mr. Witt (continued):

Q. Mr. Gardner, I think you have already testified that you told the FBI about your conversation with Sanderson here in Denver in June of '53. When you talked to the FBI on that occasion did you tell the FBI what the purpose was of your stopover here in Denver?

Mr. Kelley: May it please the Court, this matter has been gone into, and I think it is improper practice to skip around from one subject to another and then come back.

The Court: I do not know about the practice, but I am reasonably sure that the thing has been gone into twice.

Mr. Witt: This is the only question that I want to ask before I conclude this with an offer in evidence.

The Court: He may answer this question. My recollection is not sure enough to say that this precise question was answered, but the subject matter was gone into.

[fol. 732] Mr. Witt: The subject was gone into.

A. I don't know. That I don't know. That is a little detail that is hard for me to remember. If they asked me, I am sure I told them the truth. But if they didn't ask me, it probably isn't there.

Q. I didn't ask you about that. I simply asked you whether you told them about your talk with Sanderson here in Denver in 1953, whether you told them what the purpose of your stopover was.

A. I don't know. I don't recall.

Mr. Witt: In view of that, if the Court please, I now propose to read the first sentence of that paragraph on our page 5, and I show it to the Court.

Mr. Kelley: The Government objects to it for the reason there is no inconsistency and for the other reasons we have stated such as the thing has never been presented to the witness for his adoption.

The Court: That part doesn't interest me so much, but I don't see the inconsistency at all.

Mr. Witt: Just in this sense he just answered my question, that is why I asked you for the foundation of this.

The Court: He said he didn't recall.

Mr. Witt: He says in that first sentence what he stopped in Denver for, to confer—I don't want to say it in front of the jury—to confer with so and so and so and so. That is the point.

The Court: But he said he doesn't recall whether he did or not. I think I will sustain the objection.

Mr. Witt: All right, your Honor. I just want to ask him one question before I come to my offer along the same lines about the episode involving the trip from Buffalo to Canada.

Q. Mr. Gardner, do you recall whether you ever told the FBI about that trip you made with Travis and Clark to Canada and your return with Travis to Buffalo in 195;? (sic)

A. I don't recall offhand of telling him about it. I don't [fol. 733] recall them asking me. If they did, I told them.

Mr. Witt: If the Court please, in connection with both these excerpts, both the incidents about which the witness testified on direct examination, the incident in 1951 involving the trip from Buffalo to Canada and back, and the incident in June, 1953, we now propose a stipulation to the Government that nowheres in the statements furnished to the defense pursuant to Section 3500 is there anything about either of those episodes.

Mr. Kelley: I do not understand the stipulation.

The Court: I think the witness has testified to that effect, hasn't he?

Mr. Kelley: Well, he has testified that he—

Mr. Witt: He doesn't remember.

Mr. Kelley: He gave them whatever information—

The Court: He said he didn't recall that he mentioned it at all.

Mr. Witt: Either incident.

The Court: He testified this morning about it, and just now he said he didn't recall whether he gave them any information about it in effect as I understand his testimony.

Mr. Witt: And that is the exact purpose of the stipulation. Since the witness has now testified he doesn't recall whether he told the FBI about either of those episodes, we are offering this stipulation to clear the decks on that to the effect that the statements furnished to the defense under Section 3500 show that he did not at any time tell the FBI about either episode.

Mr. Kelley: Well, I would not stipulate to that, because this report, which is page 5 of the Gardner material, refers to him having talked to Mr. Travis. I would be willing to stipulate that all of this be offered in evidence and let the jury decide whether or not it is consistent with his testimony.

[fol. 734] Mr. Witt: Mr. Kelley is wrong in reference to page 5, and it is very important that we get straight on that, if the Court please, so the jury won't be confused. This first sentence on our page 5 does not say that he did talk with Travis.

The Court: What is there for the Court to rule on? You have asked the Government for a stipulation, and they have said they don't want to stipulate.

OFFER IN EVIDENCE

Mr. Witt: Nothing. In view of that, in view of Mr. Kelley's statement that he has no objection that this entire batch of statements furnished to the defense under Section 3500 be offered in evidence we now accept that, and we offer all the statements furnished the defense under Section 3500 in evidence consisting of 16 pages.

Mr. Kelley: The Government has no objection to stipulating to it. We see no particular relevance to it, but we don't object to it.

The Court: Under the stipulation you had better have the whole statement now identified with an exhibit number.

Mr. Witness: (sic) This is not in our stipulation. It is now offered in evidence.

The Court: Mark it with an exhibit number, and it will be received in evidence.

(Document marked Defendant's Exhibit L for identification received in evidence.)

Mr. Witt: May we withdraw it for the time being and talk about furnishing copies?

Mr. Kelley: We furnished that to you and one is enough. You can offer that in evidence.

The Court: You can use it; it is in evidence. It is to remain as an exhibit now. You can use it in your examination just like you could use any exhibit.

Mr. Kelley: I think we should also make it clear that Exhibits I and J are a part of this same exhibit for the record.

[fol. 735] The Court: I think that would appear from his examination.

Mr. Witt: I think the record is self-explanatory on that if the Court please.

Q. Mr. Gardner, when was it that your employment with Mine-Mill terminated?

A. It was to the best of my recollection about July, 1955,

Q. Was it terminated by your discharge?

A. Yes, sir.

Q. After your employment with Mine-Mill was terminated what was your next job?

Mr. Vincent: If your Honor please, the Government objects to that. That goes after the year 1955.

The Court: Well, I don't know the purpose, but I think he can answer the question.

A. I worked in the open pit in Butte on a power shovel.

Q. For what company was that?

A. For the F and S Contracting Company.

Q. How long were you on that job?

A. Well, until the ore froze up, so, it was sometime in the late fall I would suppose. The ore froze in the cars, and we were laid off because they could not handle the ore at the time at the smelter.

Q. When did you start on that job?

A. I believe it was August although here again I could be a few weeks one way or the other.

Q. What was your next job?

A. Well, I spent the Christmas Holidays working in the department store as a saleman just for the Christmas Holidays.

Q. Then what was your next job?

A. I went to work as a Consultant and Conciliator for the International Hod Carriers, Building and Common Laborers Union of America.

Q. When was that?

A. That was I think the first day of January, 1956. I had finished working in the store for the Christmas Holidays, and it followed that so I might conceivably have gotten a couple of days' pay in December, but I think it was probably from the first of January.

Q. When was it that you first began discussing with the Hod Carriers a possible job with them?

Mr. Kelley: That is wholly immaterial to any issue in this case.

[fol. 736] The Court: Sustained.

Mr. Witt: Might I be heard on this, your Honor, and this is preliminary, because I intend to try to show that

the Hod Carriers and the Mine-Mill were rivals in 1955, at the time this man's employment in Mine-Mill terminated and that they continued to be rivals to date?

The Court: What would be the relevancy of that?

Mr. Witt: The same in the case of the witness Eckert to show this man's interest in this proceeding and the outcome of it and to try to show that because of his employment with a union which is a rival to Mine-Mill his interest would be in hurting or damaging Mine-Mill and any person connected with Mine-Mill.

Mr. Kelley: On the face of it it is ridiculous. This man was fired from Mine-Mill in the summer of '55, and he didn't go to work with this union for six months.

Mr. Witt: The fact the man was fired just emphasizes the point, his hostility to Mine-Mill would be—

The Court: You have shown he was discharged.

Mr. Witt: But my effort is to show his work for a rival union which down to recent days—

The Court: Ask him the question about whether it was a rival union and what you want to, not the preliminary question. I will sustain the objection to that.

Q. In 1955 at or about the time you were fired by Mine-Mill were the Hod Carriers and Laborers Union a rival to Mine-Mill in the non-ferrous metals industry?

A. No.

Q. At any time since you began to work for the Hod Carriers in January, 1956, have the Hod Carriers and Laborers been a rival or opposed to Mine-Mill?

A. There has been some negotiations or discussions on the possibility of merger but they have never been rivals.

Q. Now, aside, when you say discussions you mean between the Hod Carriers and Mine-Mill?

A. Yes, that was for top level discussions for the purposes of effecting an affiliation through negotiation, but they [fol. 737] were never rivals, and they are not now today.

Q. Wasn't that because, didn't those discussions take place because the Hod Carriers and Laborers have been doing—

The Court: You need not go into it further. You said you could show they were rivals and thereby show some

interest on behalf of the witness, and the answer is they are not rivals. So, let's go to something else.

Mr. Witt: I want to impeach him with very specific references I have here about that.

The Court: I think you have proceeded on that far enough.

Mr. Witt: Then on this I am anxious to make an offer of proof as I did in the case of the witness Eckert. May I make my offer of proof?

The Court: Well, you can make an offer of proof, not here before the jury, if you have any proof to offer.

Mr. Witt: Well, I think I do, your Honor; otherwise, I would not be making it, and I do not think your Honor should comment on it until I make it.

The Court: I tell you you can make it, and I will comment on it when I make it, and I simply say it should be done on it when I (sic) make it, and I simply say it should be done out of the presence of the jury.

Q. Mr. Gardner, before you took your job with the laborers did you advise any FBI agent that you intended to take a job with the Hod Carriers and Laborers?

Mr. Kelley: May it please the Court, that is wholly immaterial.

The Court: I will sustain the objection.

Q. At the time you took your job with the Hod Carriers and Laborers, Mr. Gardner, did you advise them, any official of the Hod Carriers and Laborers with whom you discussed the job that you had been giving information to the FBI about Travis or about Mine-Mill?

[fol. 738] Mr. Kelley: Objected to as wholly irrelevant.

The Court: I will sustain the objection.

Mr. Witt: I will make this as part of my offer of proof, if the Court please.

Q. Just one question without transgressing on your Honor's ruling before I leave it that your Honor may think proper in connection with the Hod Carriers, Mr. Gardner, are you aware of the fact that at the convention of the Metal Trades Department of the AFL-CIO, the

last convention in December, 1957, that a resolution was passed to the effect that Mine-Mill should get a charter from the AFL-CIO and the Hod Carriers and Laborers in the discussion opposed that resolution?

Mr. Kelley: May it please the Court, that is wholly immaterial.

The Court: I will sustain the objection.

Mr. Witt: All right, I will make that part of my proof.

Q. Mr. Gardner, I think you have testified here that you were expelled by the Communist Party.

A. Yes.

Q. Will you tell us about when that was to the best of your recollection?

A. I was notified that I was expelled, notified by a rank and file member that I was expelled.

Q. When was that?

A. Roughly it occurred to me as about March or April.

Q. Was that rank and file member you have reference to named Arthur Morelas?

A. Yes.

Mr. Witt: In view of that at this point I propose to read page 2 of Defendant's Exhibit L in evidence.

The Court: Well, the exhibit is in evidence as I understand now.

Mr. Witt: I want to read it to the witness and ask him whether he gave this information to the FBI.

The Court: It is already in.

[fol. 739] Mr. Witt: I will withdraw it.

The Court: I am right, am I not?

Mr. Kelley: Yes, the whole document is in evidence.

Mr. Witt: Yes, it is in evidence.

Q. Do you recall telling the FBI that was Arthur Morelas who told you that you had been expelled?

A. It occurs to me that that is correct. I could be wrong, because there was already lots of rumors around that I had been expelled.

Q. But it was Arthur Morelas that told you?

A. As I recall it, it was Arthur Morelas.

Q. At the time you were a member of the Communist

Party in Butte, Montana, did you know that Arthur Morelas was then a paid informer for the FBI?

Mr. Kelley: May it please the Court, that is wholly irrelevant to the issues here.

The Court: I don't see the pertinence.

Mr. Witt: Let me ask another question, and I would like to be heard on that perhaps in Chambers.

The Court: You may proceed.

Q. At any time since Arthur Morelas told you you were expelled from the Communist Party have you been informed by the FBI that at the time you were in the Communist Party with Arthur Morelas that Arthur Morelas was a paid informer for the FBI?

Mr. Kelley: I object to that as incompetent and immaterial.

The Court: I sustain the objection.

Q. Did you at any time receive written notification from the Communist Party that you had been expelled?

A. No.

[fol. 740] Mr. Witt: If Your Honor will give me a minute or two I think I can complete my cross examination in a few minutes.

Q. Mr. Garner, (sic) you testified earlier this afternoon that it was after you testified in the Cleveland case, I think this was your testimony, were you asked to testify in this trial against Travis, is that right?

A. Yes, sir.

Q. Was that on the long distance telephone?

A. No, sir.

Q. Were you asked in Cleveland?

Mr. Kelley: May it please the Court, that is irrelevant to any issue in this case.

The Court: I don't see the point; he has testified to the fact. What difference does it make whether he was asked by telephone or in person or by letter or what?

Mr. Witt: This is preliminary again in connection with the witness' testimony that he never remembers talking to the FBI about Travis, so that I want to show on this

occasion when he was asked, if not before, he was asked about Travis; that's all.

The Court: You have asked him that and he has answered that two or three times, if my memory is right.

Q. Then let me try it this way: Before you were asked to testify in this trial against Travis were you asked whether there was testimony you could give about Travis?

A. No, sir, they asked me to stop in Cleveland on my way—stop in Denver on my way to Anchorage and they would talk to me here, and discover whether there was any contribution I had to make to this particular hearing.

Q. And you stopped here on your way to Anchorage, is that right?

A. Yes, sir, I did.

Q. And was that the first occasion when you stopped here and you were talked to about Travis, was that the first occasion at any time since you first began to furnish information to the FBI, that you gave information to the Department of Justice about Travis?

Mr. Kelley: May it please the Court, I think this has been asked and answered several times.

[fol. 741] Mr. Witt: I don't think so.

The Court: I think it has been answered several times. I will sustain the objection o that basis.

Mr. Deikman: Was the answer "yes"? Could the Court inform us on that?

The Court: What?

Mr. Deikman: Was the answer to that "yes"? He has never talked to the FBI about Travis?

The Court: I think if you refer to the Court's notes that his memory on the testimony is not infallible. We will look at the record, and I think, as I say, my best recollection is that he has answered the question before, and if I am wrong—

Mr. Deikman: Just to clarify it for me personally, Your Honor, I would like to know what his answer is, yes or no.

The Court: I say, we will look at the record. That's the way to find out, and that's the way to find out if the question has been answered. If the Court is wrong, why,

of course, there may be a basis for letting him answer again. I think it has been testified to.

By Mr. Witt:

Q. Now, you said, Mr. Gardner, that you were told to stop in Denver or they told you to stop in Denver. Who told you to stop in Denver?

A. A Department of Justice attorney, or at least he said he was a Department of Justice attorney.

Q. In Cleveland?

A. No, sir.

Q. In Denver?

A. No, sir.

Q. Where?

A. Washington, D. C.

Q. Did he call you?

A. No, sir.

Mr. Vincent: If Your Honor please, I think this is objectionable.

The Court: I will sustain the objection. If you can show me any relevancy about who asked him to come or not—

[fol. 742] Mr. Witt: This is preliminary to interrogating this man about whether he ever told anybody connected with this prosecution whether it is an FBI agent or anybody else representing this prosecution about Travis before he took the witness stand.

The Court: My point is I think he has answered the question two or three times, and I sustained an objection to that question a few moments ago, and I said if the Court's memory was wrong we would look at the record and determine whether you should ask the question, but this is, you say, preliminary to the same question, so the objection will be sustained.

Mr. Witt: Well now, just so we can finish with this, Your Honor, and not take any more of your time and the time of the jury on it, because I am also as vague as Mr. Deikman seems to be, is Your Honor's recollection that this man has said that he hasn't or that he doesn't remember?

The Court: I say, we will refer to the record. The Court is not going to rely on his memory. My impression is that he has answered the question. I don't say that as a fact; I say we will refer to the record and see if he answered the question that I sustained the objection to a moment ago; and if he has I sustain it on the basis that he has already answered the question. If he hasn't, that's something else.

Mr. Witt: I misunderstood. You mean we will do that later in chambers?

The Court: We will do it anytime. We can let the reporters look it up. We can wait until we are in chambers, I expect.

Mr. Witt: Why don't we hold that in chambers?

The Court: Go ahead with your cross examination.

Mr. Witt: All right; I will complete it.

By Mr. Witt:

Q. Mr. Gardner, you have received the per diem and the witness fee, have you, for testifying in Cleveland?

A. Well, no, sir; whatever there is is sent to my home in Anchorage.

[fol. 743] Q. Well, when you appeared before the grand jury in Denver did you receive a per diem and witness fee?

A. Yes, sir.

Q. Did you receive an expert witness fee?

A. No, sir.

Q. When you testified before the grand jury in Cleveland did you receive the per diem and the witness fee?

A. Yes, sir.

Q. Did you receive the expert witness fee?

A. No, sir.

Q. I will ask you the same questions about your testimony in New York before a grand jury. Did you receive a per diem and a witness fee?

A. No, sir—oh, yes, I received a per diem and witness fee.

Q. But, you didn't receive the expert witness fee?

A. No, sir, I did not.

Q. Is that right?

A. Yes, sir, that's correct.

Q. Now, at any time since you have begun to furnish information to the FBI have you received any payments from the FBI in connection with your furnishing information?

A. Yes, sir, I received $10.

Q. I haven't asked you that yet, Mr. Gardner.

A. Oh, I see.

Q. Can you tell us or approximate how much you have received altogether?

A. Well, from the FBI?

Q. Yes.

A. I have received to the best of my recollection $10.

Q. When was that?

A. Well, I think it was in July or August of 1956. They paid my babysitter for me.

Q. Is that the time you were spending time talking to them?

A. Yes, sir.

Q. You needed a babysitter, do I take it, because you were at the FBI office?

A. Yes, sir.

Q. And your wife was away from home?

A. Yes, sir.

Mr. Witt: Would Your Honor just give me half a moment? The question I had a minute ago has now slipped my mind. Just one matter I want to check in my notes, Your Honor. I think it will take me a half a minute.

Q. Mr. Gardner, did you come to Denver in February, 1955 to attend an executive board meeting of Mine-Mill?

A. Yes, I believe I did; I am not sure of the time.

Q. That was the last board meeting you attended before you were fired by Mine-Mill, wasn't it?

A. Yes, sir.

Q. Did you travel to Denver with Executive Board Mem-
[fol. 744] ber Salvas and another staff member?

Mr. Kelley: May it please the Court, we object to any further pursuit of this line of questioning. It covers a

period outside the period covered in his direct examination and it is irrelevant to the issues.

The Court: Of course, I don't know the purport of it or the objective.

Mr. Witt: This should be outside the presence of the jury, I think. May I approach the bench? It will take a moment. I can hold this together with our other matters; this is towards the end, and discuss it in chambers, whichever way Your Honor prefers.

The Court: That may be the shortest way to do it, take it up in chambers.

Q. All right; now, Mr. Gardner, earlier today when I was examining you and asking you about your vouchers, you said something about expenses you had in connection with your Communist Party activities that appeared—

A. I didn't say I had them, but I said that they at times had advised me that that could be done.

Q. Well, to clarify that, did you ever do it on any of your vouchers?

A. No, sir, not that I recall, I never did.

Mr. Witt: All right, that completes our cross examination. We will pass our witness subject to these problems we have in chambers and our offers to prove.

Mr. Kelley: May it please the Court, I think in order that we might have a chance to finish up this witness before the end of the day, if there is any possibility that we could resolve these offers and these other questions and let him finish his testimony before the jury is excused.

The Court: I think we will try this: we will try and see if we can do it in fifteen minutes. I don't know what the chances would be, and that would give time, if there is any more to be done in here with the witness, to call him back; so we will have a fifteen minute recess, but if it appears that we can't complete the matter within fifteen [fol. 745] minutes, why, I will advise the bailiff and the jury can be discharged until tomorrow or they can be returned to the court and we will decide that then, but we will try to get this thing settled by 4:00 o'clock so there can be a fifteen minute recess.

(Recess taken.)

In Chambers

Colloquy Between Court and Counsel

The Court: Mr. Kelley, you objected to a question that Mr. Witt asked on the basis that it had been answered, and I sustained the objection. It was my impression that the witness had answered the question. Now, do you know if that is to be found in the record?

Mr. Kelley: Well, no, I wouldn't, Your Honor. I would think that would have been covered in today's testimony, because he has just been on cross and I don't believe we have any of the transcript, do we?

Mr. Witt: We don't.

Mr. Kelley: I don't know that he was asked that particular question. I think he was asked for the same information in a different way.

The Court: That's what I thought.

Mr. Kelley: It is my recollection.

The Court: I wouldn't, as I say, attempt to recite the record.

Mr. Kelley: Might I suggest that if Mr. Witt wants to ask him directly if he gave a statement or made a statement to an FBI agent during this period he is talking about and come right to the point instead of going around the barn on it.

The Court: The point was that the question, as I recall the form of the question, was that it covered everything from the beginning of time, and I thought he had asked him previously about whether he ever had in the same kind of a general question. Now, I may be mistaken.

[fol. 746] Mr. Kelley: He did; he covered the whole thing.

The Court: If the question had been directed simply to since he has been here in Denver or come here from Cleveland or wherever it was, he has covered it up to date to Cleveland very specifically, and if the question is limited I don't know that it would be objectionable.

Mr. Witt: What would be the objection?

The Court: The form of the question, as I recall it, and I understood it went clear back to the very beginning of time.

Mr. Deikman: What was his answer to that?

Mr. Kelley: Well, he said if he was asked about it, about these things in regard to Mr. Travis, that he would have told them, but he didn't recall whether he had been asked specifically about Travis. As I recall, that's about the tenor of the testimony.

Mr. Deikman: Then his testimony is inconsistent, because he said he was asked a week ago.

The Court: Where did he say that?

Mr. Witt: No, asked to testify a week ago.

Mr. Deikman: That's right.

Mr. Kelley: That had nothing to do with making statements of what his testimony is.

Mr. Witt: In view of that, Your Honor, I think we can save time. Your Honor, the only objection I gather to the question is that it was asked before, and now we are spending ten times longer than it would take to get an answer out of him, and now in view of the kind of answers we have gotten, and I am not too clear, and we can save time not checking the record, why wouldn't Your Honor consider permitting me to ask him one general question now, not the beginning of time because obviously we are not interested, if the Court please, about the beginning of time. The record is clear that he has testified that he started to [fol. 747] talk to the FBI after he was with Mine-Mill, so that's what we are talking about, and I just want to ask him now, especially in view of his answers about being asked to come here in connection with this trial, one overall question which would be, and Your Honor might improve the phrasing of it, whether he at any time since he first began giving information to the FBI has given information to any person representing the Department of Justice about Travis up to the time he took the witness stand, and that would cover attorneys and –

The Court: I think it may not be in that precise form, but I think I will wait and see the record. What I think you could ask him is if while he was here in Denver he discussed the matter about Mr. Travis, or whatever line you used with anyone. I think that might be specific, but I think he has answered that other question, and I may be entirely mistaken. It may have been the FBI instead of Department

of Justice, or something else, but let's let that rest for a minute.

I don't understand what you mean by offers of proof; I don't know what you mean by that.

Mr. Witt: Well, Your Honor—

The Court: Do you mean you are going to offer this witness to prove something?

Mr. Witt: Your Honor, I am sorry, maybe it is a practice that isn't common here, but I did it pursuant to the practice I understand in the case of the witness Eckert on an issue more or less along the same lines as one of these we have pending with this man, that is, I started to ask him about the UAW, which is the labor union he is connected with. Your Honor sustained an objection.

The Court: I think I sustained the objection right off the bat, and I think this time I said if he could show any antagonism or something between the Union on the theory that it might import some degree of prejudice to him that you could do it, and you asked him and he said there wasn't any, and repeated it several times, and that to me seems to end the thing. Now, I don't know where you want to go from there.

Mr. Witt: I have more specific questions about the situa-[fol. 748] tion in which the two unions have been rivals, including this incident of the Metal Trades Department which I referred to Your Honor, which is a very important incident in recent labor history, particularly as far as Mine-Mill is concerned, so if he says he doesn't know or he says—

The Court: He didn't say that; he said unequivocally about three times, if I recall, that they were not rivals and hadn't been at any time.

Mr. Witt: But then my point is I don't think as I understand the rules of cross examination, I am not excluded by that answer. This man says he is a consultant and conciliator for the hod carriers.

The Court: You can show it by extrinsic evidence; that may be if it is relevant, but you can't argue with this witness about it.

Mr. Witt: I am not arguing with him about it; I am attempting to refresh his recollection.

The Court: Suppose, to take a simple specific case, it seems to me, if you have a witness on the stand in any case and you ask him if it isn't a fact that his relations with the party against whom he is testifying have been unfriendly and he said, "No, on the contrary we have been friends all our life," then are you permitted to go into a series of escapades between them to reflect on that? I don't think so.

Mr. Witt: As I know the rules, Your Honor—I could be mistaken, but this is our position on it—once he says that I think I can then seek to impeach him more to refresh his recollection by saying to him that, "Isn't it true that you and he had a fight on the saloon in June of 1956?" and then if I have other questions along those lines, true, Your Honor, professionally I have to—

The Court: I think you could probably show that by extrinsic evidence.

Mr. Witt: No, sir, I don't see how we could show this by extrinsic evidence.

[fol. 749] The Court: I want to see some evidence on this.

Mr. Witt: Your Honor, that's all they have been doing. Your Honor, just to be heard on it, because I am at this point quite bewildered about the rules Your Honor is pursuing, on your remark that we can go into it by extrinsic evidence, as I see it we can't, because this is collateral, Your Honor; it doesn't go to the—

The Court: That's the first point I was going to raise.

Mr. Witt: It is collateral; that's why we can't do it. If Your Honor wants to let us do it—

The Court: Let me see some law on the subject; I may be entirely mistaken. I am very often, but I think that's the rule, so I want to see some law on the matter of where the witness has positively stated that there is no rivalry or any other adverse relati nship whether then you can continue to cross examine him about extensive matters with respect to whether his answer was correct or not.

Mr. Witt: Your Honor, just this one word on it: It is another aspect or another branch of the same rule which permits you to impeach him with prior testimony. In the same way you laid down a foundation by asking him

whether he remembers testifying in Cleveland so and so and he says no, or he says, no, he said something else; then you show him that. That's to refresh his recollection. The same way here he says he doesn't—

The Court: Let's find some law on the subject; there should be some.

Mr. Kelley: On the matter of offer of proof, Your Honor, I can understand an offer of proof by—

The Court: By a witness. How do you know what this man is going to testify to is more than I know. That's another reason I don't know what you mean by offer of proof.

Mr. Witt: Not by what he can testify to, but what—

The Court: You can come in and say what you want to ask him, but it isn't any offer of proof that I can see.

[fol. 750] Mr. Witt: All right, I will do it either way. Maybe the practice is different, Your Honor, but this isn't proof, of course. I can't be giving testimony, but that's why it is called an offer to prove. In other words. I would say if Your Honor overruled the objection and permitted me to pursue this line what I would be trying to show is the following, and then give the answers.

The Court: You don't know that the witness is going to testify to it, and I think we are just talking about something that isn't here.

Mr. Witt: Of course not.

The Court: If you have a case and one of your witnesses in on the stand and you come to something that there is an objection made, you know what your witness will testify to and you come in here and make an offer of proof and say to the Court, "This witness will testify as follows, and we desire to offer it for that purpose," and then the Court will rule on it on the basis of the offer, but you don't know what the witness is going to answer, and you can't make any offer of what he will testify to if he is permitted to go on.

Mr. Witt: All right, Your Honor, I won't pursue that argument because, as I say, I have been permitted to do it; but then, the alternative to that and the reason why an offer to prove saves time, the alternative to that, assuming you are right on being able to impeach his answer

here, for example, about no rivalry between the two unions, is to ask him the questions I had in mind and then Mr. Kelley will object. Your Honor will sustain the objection.

The Court: The fundamental thing I want to know on that right now, and as I say I am not passing on it, is whether under the law where the witness has said there is no rivalry, whether then you can go on by interrogation and try to show an inconsistent statement with the statement about whether or not there is a rivalry; that's what I am interested in as a matter of law.

Mr. Witt: Do you want us to do that right now?

Mr. Kelley: Your Honor, let me make one statement. [fol. 751] I think this is the law, it is as I understand it, that you can only impeach a witness' testimony as to material matters, and it is not a material matter.

The Court: This isn't a question of impeachment at all; it is a question of interest with the witness, if anything, and it goes to his credibility. It is no question of impeachment.

Mr. Kelley: He is trying to say that he trying to impeach him on this statement that there is no rivalry; now he is trying to impeach him on that.

Mr. Witt: No, Your Honor, Mr. Kelley is referring to—

The Court: Let's look up the law.

Mr. Witt: Just so we will get our position on this last statement made by Mr. Kelley, Mr. Kelley is referring to the rule about not being able to impeach a witness on cross examination by extrinsic evidence on a collateral matter, and that's why this is the way to do it. If the law is that, Your Honor, as Your Honor seems to indicate, that you can do it by extrinsic evidence, we can do it and will be glad to do it.

The Court: If it is a material point. The question he is raising is if it is a material point you can do it, but I don't know whether there is a material point. You can do it by extrinsic evidence on material evidence, but I don't know whether this is. I want to see what the law is on the question that I just propounded. I may be entirely mistaken, but I think there is some limit to what—it would be arguing with the witness about his construction of some state or relationship and what someone else's might be.

Mr. Deikman: Do you want us to dig up the law on that right now, Your Honor?

The Court: No, not right now. What else was there now to be determined?

Mr. Witt: Your Honor, give us a moment. All right, Your Honor, we will dig out the law as soon as we work out where we stand on that question. I have made a note [fol. 752] of the problem we have for chambers, and may I take them in order, if the Court please? I may be wrong.

First, there is pending the matter we discussed in chambers at the end of the morning session, that is, my questions to the witness about his talks with the FBI and about his testimony before a grand jury about the thirteen defendants and in the conspiracy case other than Travis.

The Court: I thought I had ruled on that, haven't I?

Mr. Witt: You did, Your Honor, and again this may be disposed of by the question we just discussed, because there I said I would make an offer to prove, but then in view of what Your Honor just said about the other question about Travis, maybe we better hold that one, too, until we settle the law, because if Your Honor is right about my not being able to make an offer to prove, then the only alternative I can see would be for me to take and go through the other thirteen names and have Your Honor sustain Mr. Kelley's objections.

The Court: I have already sustained the objection to the names you have asked.

Mr. Witt: I want to complete the thirteen names. I will ask Mr. Deikman to check me on this and see whether he agrees. Perhaps we can dispose of that one, if Your Honor wants to, by having the record show at this point that I would ask him the same questions about those thirteen names and that Mr. Kelley objects to all that, and Your Honor sustains Mr. Kelley's objections. All I want to ask him is whether he gave information to the FBI or testified before any of the grand juries about these thirteen people without asking him what he said about them.

The Court: I would sustain the objection to that, and unless there was some showing made that there was something in the situation that would make the discussion of whether one was had or not that would be relevant in

this case, and I would sustain the objection to any cross examination along that line.

Mr. Witt: All right, sir, then I think that's a sufficient record, but the record should show again we could make it clear this morning, that the purpose of asking him about [fol. 753] these other thirteen people named in the conspiracy indictment aside from Travis is that the witness did talk to the FBI or did give testimony before the grand jury about some or all of those thirteen, so that any testimony from the witness that he did not talk to the FBI or give testimony about him before any grand jury would be so incredible as to be obviously unworthy of belief.

The Court: I think, as I pointed out this morning, if he testified before the grand jury or had made statements to the FBI about a post office robbery in Los Angeles, California, with no further showing that it had something to do with this case, it certainly wouldn't be proper to ask him if he talked to the FBI about some witness in those cases or gave testimony before a grand jury about that case, and that's the basis the Court is proceeding on, and the objection will be sustained.

Mr. Witt: All right, and the same problem, Mr. Deikman has something to say. This is on another aspect of the problem, if the Court please.

Mr. Deikman: Your Honor will recall that the Court stated in the presence of the jury that the statement of the witness on page five of the FBI reports or statements given pursuant to Rule 3500 showed no inconsistency.

The Court: I don't think the Court said that, and we will wait and see the record in the morning. I don't think I said that at all. I said I thought it might, and I said it would be a question for the jury to determine.

Mr. Deikman: At that stage of the proceedings, Your Honor, there was some difficulty as to introducing this particular document because the Government objected, as I recall, that it could not be introduced into evidence in so far as it did not show that the witness' statement given this afternoon was inconsistent with the statement which appears in this document.

Now, as I understand Your Honor's ruling you held their objection—

The Court: The whole thing is in evidence now, so that's water under the bridge unless there is something else.

[fol. 754] Mr. Deikman: I am coming to another point. I am not arguing for the Court to overturn anything the Court has done.

The Court: I let it be read in evidence right then.

Mr. Deikman: Yes, Your Honor. I would like—

Mr. Witt: No, they weren't read in evidence.

The Court: Yes, both of them. First I let you read the second sentence, and then the first sentence in evidence.

Mr. Deikman: I am talking about what follows; I think Your Honor should look at this. We may be talking about different things.

The Court: I saw that in there, yes. What is it?

Mr. Witt: None of that has been read in evidence.

The Court: But it is in evidence; anybody can read it that wants to.

Mr. Witt: That's a different problem.

Mr. Deikman: I am just trying to review the situation because the request I am going to make is this, and I think I ought to be able to explain why I am making this request. I am making the request first, and then I will make my explanation. I request that the judge or the Court reconsider the matters which have been deleted from this report; in view of the witness' testimony on cross examination I am moving that the Court re-examine this report with an eye to seeing whether now any of the excised material is relevant to the subject matter. Now, the reason I am asking that is because it seems to me—now, I could be wrong—but, Mr. Kelley and the Court agreed that Mr. Sanderson, the reference here to Mr. Sanderson, was not inconsistent with the testimony of the witness. The reason was because the witness stated that he did recall that he had made some statement to the FBI regarding a conversation he had with Harold Sanderson on this occasion, and that he also recalled that Sanderson briefed him very briefly about what Mr. Travis said, and the only reason this is in the FBI reports and—

[fol. 755] The Court: No, he didn't testify to that. Let's get straight on the thing. He testified that Sanderson briefed him about the situation in Idaho, that Mr. Travis

later on amplified and adhered to it, and the way that he testified to on direct examination.

Mr. Deikman: I agree with that summary on the part of the Court; that's what I was trying to get at. Now, my point is this, that that would appear to be a consistency rather than an inconsistency in his testimony, particularly in view of the fact that he said the only reason he mentioned this episode at all to the FBI was because they specifically inquired about Harold Sanderson. They didn't specifically inquire about Travis or about Mine-Mill or about anything else. They specifically inquired about conversations he had had with Sanderson, so he gave this conversation regarding Harold Sanderson.

Now, in looking over this report it seems to me that that is an unlikely statement on the part of this witness, that it may not be true, because it does not appear from this report that the report is concerned specifically with Harold Sanderson or that even if this stage of the inquiry were the FBI that the FBI was interested particularly in Harold Sanderson but they were interested in episodes, and that, if we had further material in this report, your Honor, if we had the material that has been excised, it is our feeling that it might bear us out on that. Now, we are not saying that it will bear it out. We are only asking that the Court reconsider the excised material from the point of view of whether that excised material will reveal that the witness was not stating the truth when he said that he was only questioned as to Harold Sanderson.

The Court: Well, your motion for the Court to review the matter will be denied, because the Court to the best of its ability, as I say, the record will be available, if there is any appeal, excised certain portions in accordance with what I understand the rule to be pronounced in 3500, and any discussion of what matter was excised or what was included would amount to a divulgence of the report, so, the motion to reexamine will be denied. I think we had better get the jury in, because I want to excuse them. I haven't completed my examination of this report with respect to this other witness. I have it about two-thirds complete. I think within an hour I can get it completed. [fol. 756] Now, I assume from what you gentlemen for the

defense said you wish to have this witness who is now on the stand come in Chambers and give some testimony, is that right?

Mr. Witt: Yes. We haven't finished with the pending problems in court.

The Court: There is still this one problem and then this question of law.

Mr. Witt: A couple of other things pending from the open court.

The Court: Anyway, what I am thinking about now, I do not want to keep the jury sitting around this late hour in the afternoon, and, if I can get this material so you can have it tonight, say, by 5:00 o'clock, and I think we had better terminate this arrangement now unless it amounts to something directly that may be ruled on. All I know that is held up is looking up this question of law and checking the record about this answer that is relevant right now to his examination in Court, but in view of the fact that we are going to have this examination in Chambers I think we had better let the jury go until 1:30 now, is what I am getting at.

Mr. Kelley: It looks like it.

Mr. Deikman: Until 1:30 tomorrow.

The Court: Yes.

Mr. Kelley: There is only one problem with that decision. If we could clear up the matters that have been before the jury with Mr. Gardner.

The Court: On this one question I don't know what to do until I know what the law is on this one question. Mr. Kelley has pointed out something very real that I overlooked. If he is going to be permitted to answer any further question before the jury and we wait until tomorrow to decide that, then we are going to have to have the jury in and have to talk about this. If we decide that and get this cross examination here in Chambers over, we can go in the courtroom, and, if there is anything more to ask him, all right. If there is not, we can go ahead with the other witness.

[fol. 757] Mr. Kelley: Isn't this question that you still have to ask him one that would properly fall in the category of those to be asked in Chambers, because what you are

doing, as I see it is trying to lay a foundation to prove that the Government hasn't produced all the FBI statements there might be.

The Court: That will be what it is in here, part of it.

Mr. Kelley: But this question—

The Court: What the questions in court are is first whether he can answer this question if he talked to anybody without limitation or what, that is number one, and that will depend on what is in the record. Secondly, he wants to interrogate him further about the relationship between this Hod Carriers Union and the Mine-Mill Union.

Mr. Kelley: Yes.

Mr. Witt: Then there are a couple of others that I mentioned.

The Court: What others?

Mr. Witt: We have pending from court another aspect the same page Mr. Deikman just referred to from the FBI material, page 5. That is with respect to only the first sentence of that paragraph, your Honor.

The Court: The whole thing is in evidence.

Mr. Witt: Will you bear with me? It is not a question of admitting this in evidence. It is a question of being able to ask him questions about it, and your Honor stopped me on Mr. Kelley's objection on this first sentence which states that in regard to the Wallace-Kellogg, Idaho, area, Gardner stopped in Denver to confer with Harold Sanderson and Maurice Travis, and when I asked him about that Mr. Kelley objected, and what I want to show before the jury is that despite the testimony he was asked by the FBI only about Sanderson and that here in telling the FBI—

The Court: You can read that to the jury and argue anything you want to about it.

[fol. 758] Mr. Witt: I want to go on and ask the witness questions about it, because, and that is what your Honor is stopping me from doing—

The Court: I don't recall anything like that.

Mr. Witt: —because what I want to show and ask him questions is that he did tell them that he stopped in Denver to confer with Sanderson and Travis, and then I want to ask him whether when he made that statement to the FBI

he went on and told them only what Sanderson told him and didn't tell them what Travis told him.

The Court: I think that is just purely argumentative. We can take that up. Anyway, I think I will go in and tell the jury to come back at 1:30.

In Chambers

The Court: As I recall, where we left off last night among other things was to enable everyone to look at the record to see whether a question Mr. Witt asked which I think appears on page 1230 of the record had been previously answered, and the Government objected on the basis that the question had been answered several times. The Court could not recall precisely but sustained the objection on that basis and indicated that we would look at the record and see whether the matter had been answered. I think I expressed in the record in the course of the discussion that my impression was that the witness had answered the question. Now, have you searched the record, Mr. Kelley?

Mr. Kelley: I haven't gotten entirely through it, your Honor, but I find on page 1120 in Volume X of the transcript Mr. Witt was examining the witness, and he asked this question: "Take the conversation you had with Travis at his home here in Denver in June of 1953, did you ever tell the FBI about that? Answer: Not that I can specifically recall. I don't think they ever asked me about it that I can recall. If they did, I told them about it. I just don't remember them asking me about it. Question: Did you ever give the FBI any information about your stopover here in Denver in June of '53? Answer: Yes, I think I was asked about it once. Here, again, I am just not too sure, [fol. 759] but I vaguely remember some question about coming to Denver. Question: All right, what do you vaguely remember telling the FBI about the stopover in Denver? Answer: Well, I remember they were asking me specifically about some person here in Denver." And that, it seems to me, that is the part of the same thing he is trying to cover by his present question.

The Court: Well then, on 1121, I made some notes here, I went over that, Mr. Witt asked: "I will ask you again whether you told them anything about Travis in connection with that stopover in Denver in June of '53. Answer: I don't remember whether I did or not. I don't recall telling them, but I could have." And then he interrogated about whether he told them that he stopped at Travis's that night and so forth, and the questions continue about the subject, and then on page 1123 he said: "When was the last time you talked to the FBI in Butte about Travis or Mine-Mill or Harold Sanderson?" And he answers that question. And then the next question, "You don't recall giving the FBI any information about Travis, is that right? Answer: Well, I don't offhand," is the answer. "I don't recall it. It is entirely possible, because they asked me about a lot of people." The question that was asked where we stopped yesterday related to a conversation had in Denver, and also he asked if the information was given to the Department of Justice as distinguished from the FBI. Now, do you have any comments on the subject?

Mr. Witt: Just this comment, your Honor: It is true that I was asking him at page 1120 in that part of my examination generally about Travis, but at page 1230 at which appears the issue we are discussing I was getting back to it, if the Court please, because by that time, that is, between the time he gave the testimony which appears on 1120 and the testimony on 1230 he had testified under my examination that he had been asked by an attorney of the Department of Justice to stop here in Denver after testifying in Cleveland a couple of weeks ago to discuss the question of his testifying in this trial, so, my cross examination by the time I got to page 1230 had opened up that incident. So, I was doing two things at 1230: One, going into that incident which he had opened up by his own answers and, two, I made it the Department of Justice on 1230 instead of the FBI. I broadened it because of his reference to an attorney and my assumption that when he got here at Denver it was probably one of the prosecutors, one of the attorneys instead of the FBI who talked to him. So, from both those points of view I think [fol. 760] I was entitled to go back to it.

The Court: I think probably you ought to be entitled to interrogate on that basis, but I think this question is probably objectionable in the precise form it is, because the question says, "And was that the first occasion you stopped here and you were talked to about Travis? Was that the first occasion since you first began to furnish information to the FBI that you gave information to the Department of Justice about Travis?" The witness hadn't testified that he talked about Travis. I think there should be, I think you could inquire properly if he did on this occasion talk about Travis, and then, if that was the first occasion to furnish it, something along that line.

Mr. Witt: Yes.

Mr. Kelley: I think as to form Department of Justice is a little broad, because the FBI is part of it.

Mr. Witt: The whole question is badly framed.

The Court: If he talked to anyone about Travis.

Mr. Witt: I think I get it. You will give me a chance to phrase that, Judge.

The Court: All right.

Mr. Witt: I do not mean now. I mean when I do it in court.

The Court: Well, yes.

Mr. Witt: I will work it out before we get in court.

The Court: I think it is proper that you can go into the subject. The next thing was about this examination about—I had it here a moment ago and lost the place—this discussion, interrogation about whether the Hod Carriers Union was a rival union of the Mine-Mill. It begins on page 1223. What have you gentlemen to say in support of that this morning? I raised a legal question about going into specific discussion with the witness after he had answered that there was no rivalry between the unions.

[fol. 761] Mr. Witt: Are you addressing yourself to us?

The Court: Yes.

Mr. Witt: All right, your Honor, I did some research on this problem as best I could last night with the very inadequate law libraries which are available here in Denver, and I think I found reference in Wigmore to a rather recent case that is in the supplement, I do not have Wigmore with me.

Mr. Kelley: We have it available.

Mr. Witt: I do not need it. Maybe we will want to get it later, but let me make my statement. First, this subject was discussed in 3 Wigmore Section 953, and there Wigmore is discussing the question of bias and preliminary question that is required if you are seeking to impeach the witness by prior utterance, but in the last sentence in that section just to make the distinction Wigmore says that a preliminary inquiry is required only if you are seeking to impeach the witness by utterances or like we have been doing with respect to prior testimony, but he goes on to say preliminary inquiry is not necessary when you are seeking to impeach him for bias on the basis of conduct or circumstances, and I am now quoting: "* * * such as an assault or an employment by," and I emphasize the word employment, because that is precisely the issue here, his employment with the Hod Carriers.

If the Court please, as authority for that sentence Wigmore cites a Rhode Island case that is rather old, you will find it in the footnote, on page 514 in that Volume 3 which supports us, but I have a more recent case in the supplement, the current supplement to Volume 3, and, of course, Mr. Kelley and your Honor, in connection with Section 953. The supplement in this connection refers to Walker vs. Estate, 74 Georgia Appeals 48, 39 Southeast Second 75 at 77.

In that case the Court said—I didn't have time to read the facts; it doesn't matter, because the opinion seems to me so clear on this point—the Court says, "If the witness is asked whether he has ill will—" This is in connection with bias, and in this particular case it had to do with ill will—"If the witness is asked whether he bears the defendant ill will, if he says 'yes', then you cannot go into [fol. 762] particulars." The Court doesn't explain why, but obviously, the defense has gotten everything from the witness it is entitled to get, and you cannot try cases within cases and get into collateral issues.

Then the Court goes on to say, "If the Court says 'no'—," and this is precisely our problem, "If the witness says 'no', then it is proper to ask about the occurrence which shows the ill will." In the particular case the Court held that since the witness had not been asked the pre-

liminary question, therefore, the foundation not having been laid, the impeacher, the cross-examiner could go into the details. That is even stronger than Wigmore. Wigmore says no preliminary inquiry is necessary. So, we are gilding the lily here with our preliminary inquiry, but in any event whether we are or not this Georgia case holds that once you put the preliminary inquiry and you get an answer "no" then you can go into details.

Finally, your Honor, so that you won't get alarmed as to the extent to which we think we can go on this I think I should make it clear that I have no intention of going into details, but I do have the intention of asking him about specific episodes showing the rivalry between the Hod Carriers and Mine-Mill. I should also remind your Honor in the same connection, because it is part of the same problem, about the witness's answers at this point in the record we are talking about relating to the merger discussions between the Hod Carriers and the Mine-Mill, and, if I am permitted to ask questions about specific occurrences about rivalry, I also intend to ask him a few more questions about the merger discussions to show that the Hod Carriers are not interested merely in raiding, to use the word that is used in the labor movement, raiding Mine-Mill in the particular operations in the nonferrous industry but the Hod Carriers have been interested in several years in attempting to take over Mine-Mill altogether by means of merger or otherwise.

Finally, as I think I said in open court, I want to show that just a month ago when an important body of the AFL-CIO, the Metal Trades Council, was discussing a resolution at its convention proposing that Mine-Mill be given a charter by the AFL-CIO the opposition consisted of only two unions, both rivals of Mine-Mill, one of the Operating Engineers and, two, the Hod Carriers for whom this man works.

The Court: Do you have any comments for the Government?

[fol. 763] Mr. Kelley: Yes, your Honor. In the first place, what counsel is trying to show is some rivalry between two unions, and it is a collateral matter which doesn't, I mean it doesn't follow even if that were true that whatever rivalry

might exist between a union that the witness belongs to and the union that the defendant belongs to would carry over to the witness. That doesn't just follow in natural sequence.

Secondly, if you get into this question, you would have to go into it pretty deeply it seems to me to show the relationship of this witness to the issues between the two unions, and I can conceive of it developing that the witness might testify that the reason the Hod Carriers opposed the merger or whatever was being discussed at that time was because of the leadership of Mine-Mill, and then Mr. Witt would be objecting to it bringing in the Communist issue in that manner.

Now, we have found a case that I think is pretty much on the point. It is Crocker First Federal Trust Company, et al., vs. United States, 36 Federal Second 545. It is a Ninth Circuit case, it arose in California during Prohibition days. The applicable part of the opinion is found on page 546, and I believe because the question may come up again I will read enough of it so the point is quite clear: "The Government witness has testified that he made a purchase of a pint bottle of whiskey at 7:15 a.m. on June 16, 1928, from the wife of the proprietor, stated on cross examination that he was alone when he entered the hotel and when he purchased the liquor. Thereupon, he was asked to write upon a piece of paper in order to identify the handwriting in the hotel register. The Court directed counsel instead to let the witness pick his signature from the book. The District Attorney objected that this was not proper cross examination, and the Court then refused to allow counsel for the defendant to follow this line of examination to which the defendant Sutton excepted pointing out to the Court that the handwriting which shows that the witness had testified falsely and in fact had spent the night at the hotel with a woman registered as man and wife. The witness stated he did not remember what name he gave and did not remember using the name 'Clyde Webber'. Afterward the defendant Sutton testified that the witness was accompanied by a woman and that he registered as 'Clyde Webber and wife'. In view of the evidence it was certainly proper for the Court to require that the witness be shown the hotel register and the disputed signature or at least the oppor-

tunity to identify his handwriting thereon before embark-
[fol. 764] ing in an investigation of handwriting. It is required that a witness be shown documents containing statements alleged to conflict with his testimony before he is interrogated thereon, and the hotel register was alleged to have such a document."

Now, this is the rule of law that I think is applicable here: "Moreover, the offer was to impeach the witness, and a witness cannot be impeached upon an immaterial or collateral matter particularly when it is first brought out on cross examination. It was no doubt proper to allow a broad latitude in cross examination, but the scope of examination is largely in the discretion of the trial court. There was no claim here of that broad right of cross examination but the narrower right of impeachment. In the exercise of that discretion the trial court could and should consider the rule that evidence merely tending to degrade a witness unnecessarily should be excluded." And it cites some California cases.

"The ruling of the trial court was not an abuse of discretion." It seems to us, your Honor, that what counsel is getting into is pretty much collateral, and even if you could establish that there was some rivalry or conflict between two unions, it would not be imputed to the relationship of the witness and the defendant.

The Court: Well, that goes to the initial validity of the ruling on the first question when he asked him about the matter of whether there was a rivalry between the Hod Carriers and Mine-Mill. I sustained an objection on the same testimony when the witness Eckert was on the stand, as I recall now, and I think that was probably the correct ruling. I did, however, overrule the objection to this question, and the thing that I am confronted with now is whether having overruled the objection in the first instance whether they can go into these other matters when the witness has testified there wasn't any rivalry at all, and I think, I wish you would get Wigmore and that case. You can get it in due course. I am not going to stop and get it now. I will before we resume court and make a ruling on it.

Again, as I say, I have considerable doubt about the propriety of letting the thing be gone into in the first in-

stance, as I think about it, but anyway, I want to see those [fol. 765] cases before I rule. I will tell you before we resume what my ruling is on the thing.

Now then, I believe that disposes of all the matters that were left in abeyance.

. . . . . .

[fol. 782] (Mr. Gardner entered the Court's Chambers.)

Mr. Deikman: For the record, your Honor, we are now going to proceed to examine Mr. Gardner to support our position for production of statement under Section 3500, and, so, that is the purpose of this examination. Secondly, there will be sufficient references to the Grand Jury in our examination to also support our motion for production of Grand Jury minutes which has been previously made and which we will again make at the close of this examination.

Mr. Kelley: The Government would object to any evidence in regard to the production of documents under Section 3500 for the reason that the Government has already complied with that motion.

Mr. Deikman: That is the purpose of this examination, your Honor, to determine whether the discretion which has been placed in the hands of the United States Attorney has been in any manner abused or to clarify the question of what are statements. It is our feeling that it cannot be left up to the Government to determine what materials it will or will not produce, that there are materials that we know of which constitute statements under Section 3500 which have not been provided us in relation to the witness Gardner. We could not make that statement in regard to the witness Eckert before we proceeded to examine him, but I can represent to the Court now that we can make that statement in regard to the witness Gardner.

The Court: Well, I mean the Court knows nothing about it, and I assume that what you are going to attempt to establish is the existence of some statement as defined by 3500 that hasn't been produced. Is that what the purpose is?

Mr. Deikman: That's correct, your Honor.

Mr. Kelley: Mr. Deikman has made the statement that he knows that that is a fact. It seems to me—

The Court: He is not testifying.

[fol. 783] Mr. Kelley: It seems to me that he can, if he knows about it, he should state it. How can this witness testify as to whether we have exercised discretion properly, exercised discretion at all?

The Court: I do not think that is the question at all. I think the question simply is, if they can establish there are in existence anything that, any statements that come within the definitions of 3500 that are in the hands of the Government, then they would have a right to ask about its production. I think that is the objective here.

Mr. Deikman: That is our position.

Mr. Vincent: I would like to say that I do not think Mr. Deikman mentioned that any other documents would relate to the direct testimony of this witness. I think he omitted that, and I think that is important.

The Court: That is true.

Mr. Deikman: Just to clarify the record on that, I understand it has been your ruling that we may not go into the subject matter of any statements given to the Government Agents. Now, I may be wrong on that, so, I wish—

The Court: I do not think the ruling is that way. I think that I haven't permitted you to go into the detailed statement, but certainly, as I used in my illustration the other day, if the witness talked to the FBI five years ago about a Post Office robbery in Los Angeles, that certainly isn't involved in this case. It has to be about something that is involved in this case, and you can identify it generally as matters relating to the case when the rule provides it be established it is relevant to his direct examination. You can proceed, and we can probably meet it better with specific objections as you proceed. So, proceed and interrogate him, and I wish, of course, which has been the understanding, that you would not go over matters that we have had heretofore in the courtroom by reference.

Mr. Deikman: I will do my best to bear in mind what has been testified to in the courtroom. If I am wrong about that, I am sure Mr. Kelley or the Court will correct me.

* * * * * * *

[fol. 785] FRED GARDNER, a witness called on behalf of the Government, having been formerly sworn, testified as follows:

Examination.

By Mr. Deikman:

Q. Mr. Gardner, I believe you have testified that you furnished information to the Federal Bureau of Investigation in August of 1955. Now, to the best of your recollection at this time is that the earliest that you furnished information to the Federal Bureau of Investigation?

A. It is.

Mr. Vincent: The Government objects to that unless it is particularized. This is a general phrase "any information".

The Court: I think I will sustain the objection to that. Let's get down to something specific here. I think he testified to that on cross examination.

Mr. Deikman: That is what I point out in my question, your Honor.

The Court: Yes.

Q. Mr. Gardner, did you furnish information to the FBI in August of 1955 regarding your Communist Party experiences?

A. Yes, I furnished information to the best of my recollection about six to nine months after I was expelled from the Party, and I accept August as the date. I don't remember.

Q. You accept August as falling within six to nine months?

A. Yes.

Q. Actually, you were expelled according to your testimony in April or March of 1955, so that August would be at the very least five months?

The Court: He went over this.

Mr. Kelley: That is argumentative.

The Court: He went over this specifically in the courtroom, didn't he?

Mr. Deikman: I recognize that. This is to clarify his answer.

[fol. 786] The Court: All right.

Q. At the time that you were (sic) furnished the FBI information in August, 1955, relating to Communist Party experiences was that—what agent did you talk to at that time?

A. I talked to Zoller.

Q. I beg your pardon?

A. I talked to Tom Zoller, and at times another agent was present.

Q. Are you speaking of more than one conversation or meeting in August, 1955?

A. No, I think the very end of August. There was another meeting, and I think that meeting was with Zoller, and I think Hutchinson was present at that meeting.

Q. Zoller and Hutchinson were present during one interview in August of 1955, is that correct?

A. Yes, sir, that's right. I think it was the very end of August at the very best.

Q. There was only one meeting, as I understand your testimony, in August of '55 that you recollect?

A. Well, I recollect a meeting that took place approximately six months after I was expelled from the Party, and then after that there were other meetings, sometimes over a cup of coffee we talked about something.

Q. But only one in August, 1955?

A. That is all I can recall.

Q. Now, were you contacted by the FBI, or did you contact them?

A. No, sir, I was contacted by the FBI.

Q. Where did the conversation take place?

A. Which conversation?

The Court: You have been over all of this.

Mr. Deikman: In August, 1955, where did the conversation take place, as far as I know there is no reference to that in the record, and I very carefully examined the record, and I think it has to do with what facilities were available for the taking of a statement. Now, oftentimes witnesses will state that they don't recollect—

The Court: Why don't you ask if any of these statements were ever transcribed or ever taken down? One other vice here is that there have been furnished to you, I have no recollection to date, there have been furnished to you certain statements and certain matter that you have referred to. Of course, it has been furnished. This interrogation, as I understand your position, goes to something that hasn't been furnished.

[fol. 787] Mr. Deikman: To make the record clear on that, your Honor has pointed out that we have been furnished with some reports or statements. Now, page seven of the statement that we have been provided with refers to a report made by the witness to the FBI August 29 and 31 of 1955. Now, that refers to two conversations. The witness here is talking about only one. Even apart from that, what I am really getting at now is that this is obviously a composite of statements made during several dates, because it is not only a statement for the period of August, 1955, but also September, December, October—no, wait a minute.

Mr. Kelley: That is—

Mr. Deikman: At least two other months.

Mr. Vincent: That is only his conclusion.

Mr. Deikman: May I finish that, Mr. Vincent?

Mr. Vincent: Surely.

Mr. Deikman: It is our opinion that it is possible that there are reports behind this report, because I can't see that the FBI Agent involved or Agents involved would have remembered without having taken some kind of a statement from the witness the material which they put in this composite report. So, what we are getting at is, were there statements behind this statement?

Mr. Kelley: How would the witness know?

The Court: How would the witness know?

Mr. Deikman: We are entitled to show it by circumstantial evidence.

The Court: I haven't seen anything in what you are asking him that would relate to that at all.

Mr. Deikman: Well, your Honor, I am trying to get down to details about when these conversations with the FBI concerning his Communist Party activity took place in Au-

gust of 1955, where they took place, what the circumstances were so we can tell whether notes were taken.

[fol. 788] The Court: You can ask him that. The simple thing I said, and I am not going to take the time to look at the record, I thought, I think I have a definite recollection he testified where the various talks took place, but you can ask him, I guess the question was, you can reask him where these conferences in August took place or talks.

Mr. Deikman: Yes, sir.

Q. Would you answer that question?

A. As I understand the question, where these conferences took place?

Q. Yes.

A. In the offices of the FBI in Butte, Montana. Now, I would like to just point this out, that there was occasions—Butte is a small town, on those occasions where I might have had a cup of coffee, and we might have talked about fishing and incidentally, the Communist Party. I am not recording those as conferences in the sense that you are talking about.

Q. I agree with you, Mr. Gardner. I don't believe we should go into such matters as conversations about fishing, so, you will take it for granted that I am not seeking that kind of information. I believe you remember, and I think the report was correct—correct me if I am wrong—that there were two conversations in August. Now, were Zoller and Hutchinson present at both of them?

A. I am not sure. I remember that I was first contacted at my home and asked if I would come to the offices. Now, that was all that was done at home. That contact was made approximately six months after I was expelled from the Party, and from March 1 to August 31 could be six months, and that is approximately that time, and I am not trying to fix it exactly at six months or exactly at nine months. I fixed an approximate time there. I was first contacted by them there, and then I went to their offices following that contact at a time specified. Now, there may have been two meetings in August. I don't recall for sure when those meetings took place. If they took place—the first one took place on the 18th of August. I might say there were two there. They

came in the very latter part of August at the best, and I just don't remember even how many of such conferences took place, but I do remember that several conferences took place and those conferences took place in the offices of the FBI in Butte, Montana.

Q. You mention that they came to your home. Is that the same agents?

A. There was one agent stopped by for one minute. He came in the front door, didn't sit down. He asked me if I would be willing to meet with them and talk to them, and [fol. 789] at that time he pointed out to me that I didn't have to, that there was no pressure on me to do that.

Q. All right. Will you try to just answer my questions? I am not objecting to your going into that other material, but I think we will save time if you answer my question directly whether there (sic) was the same agent, because what he said to you about putting pressure on you is interesting, but it is not what I am getting at right now.

Mr. Kelley: I think the witness should be permitted to give what he thinks is a fair answer to the question.

The Court: I do too. He answered the question once already. Proceed. Let's cut it down to a minimum on both sides. If the witness wants to explain, he can.

Q. Do you recall his name?

A. I don't believe I got the name of that agent. I am sure what it was. It was the first FBI agent that I had ever seen him to recognize him as an agent of the FBI.

Q. I believe you testified in Cleveland that an FBI agent was a neighbor of yours?

A. Yes.

Mr. Vincent: That question is improper, his recollection of what the witness testified to in Cleveland.

The Court: I will sustain the objection to that. This examination in here is not for impeachment or something like that or not for the purpose of testing his recollection or anything else. He in effect is your witness to establish what you purport to be the existence of something that the Government denies exists in effect. So, let's go ahead on that basis.

Q. Following the FBI agent whose name you don't recall coming to your home you shortly went to the FBI offices. Now, at that time it was Hutchinson and Zoller that you talked to?

A. Well, I am not sure—

The Court: Mr. Deikman, I do not like to interrupt here. He has said three or four times he remembered this one gentleman but he wasn't sure that the other one was there and didn't know. You stated your question as though they were both there. Now, let's get away from that and go ahead and ask him questions.

[fol. 790] Mr. Deikman: He mentioned both Hutchinson and Zoller. I think you are confused. He said he didn't remember the first FBI agent.

The Court: Didn't you say that you mentioned one man and you said the other may have been there some of the time or something like that?

The Witness: That is exactly what I testified.

The Court: That is the point I am making. You can go back to the record, if you wish, to see it.

Mr. Deikman: Well, I have here in my notes that he said Hutchinson and Zoller, but I do not want to take time to go back on the record.

Q. Were there other FBI agents present during that conversation whose names you don't recall or do recall?

A. I don't recall who was there. I recall that Zoller was in most of the conferences that I had.

Q. I am speaking of this first meeting.

A. I don't remember.

Q. In their office.

A. I am pretty certain that Zoller was there, but I don't remember for sure which ones was at which.

Q. Now, speaking of this first meeting, did your conversation with them at that time relate to your Communist Party experiences?

Mr. Vincent: It has been asked and answered.

Mr. Deikman: If it is answered, I will go on to the next question.

Q. How long did that conversation last?

A. Oh, I don't remember. I would guess it was fairly brief.

Q. Well, did it last more than an hour?

A. Probably less than an hour.

Mr. Deikman: Your Honor, I am not doing this for impeachment purposes, but just to clarify the record, in the Cleveland trial he testified that this lasted—

The Court: How do you know that he did?

[fol. 791] Mr. Deikman: I would like to bring it out. I am not doing it for impeachment purposes. I would like to warn the Court in advance my purpose is not for impeachment.

The Court: Ask a proper question, and then I will rule on it. Then I can tell whether he should answer it.

Mr. Deikman: All right.

Q. In the Cleveland trial you testified in response to the question, "How long did this conversation last," you said, "Probably a couple of hours more or less. It could have been three." Wasn't that your testimony?

The Court: How do we know we are talking about the same conversation?

Mr. Deikman: I am trying to save time, but we will go back to the beginning of it. It takes several pages.

Q. In the Cleveland trial this testimony was given: "I gave some information to the FBI I believe about six to nine months after I was expelled from the Communist Party. Question: Would that be December of 1954? Answer: I was not expelled in '54, so, it wouldn't be December. Question: Would that be December of 1955? Answer: I would rather believe it was sometime early in 1956. Question: And to your best knowledge what day was that in 1956?"

The Court: What has that to do with this? He has testified all about that.

Mr. Deikman: He is testifying about his first meeting in this trial.

The Court: Proceed.

Mr. Deikman: I am talking about his first meeting in the

FBI office. I referred to the fact that during his first meeting he said that the conversation lasted—

The Court: Show me where the Cleveland record is when he estimated the time there with respect to this first meeting.

[fol. 792] Mr. Kelley: I cannot see it is relevant anyway whether it was one or six hours.

Mr. Deikman: On page 811 of the Cleveland transcript when they were referring to the first conversation he had with the FBI he said, "A couple of hours more or less. It could have been three."

The Court: Where does that identify the meeting as being the one he is talking about now?

Mr. Deikman: It begins on page 807 which I am trying to read.

The Court: I am not interested in when he left the Party and all that. When does he talk about the conversation?

Mr. Deikman: That is how he identifies when he first talked to them, he says by when he left the Party.

The Court: If there is nothing more definite than that, if the Government wants to object, I will sustain the objection.

Mr. Kelley: We object to the whole thing. In the first place, your Honor, the direct examination shows that during this conversation he didn't talk about Mine-Mill and Travis, and so, this is all irrelevant, the meetings at which—

The Court: I think that is what he testified to, that he didn't talk about Travis at all. That is what he testified to in the courtroom.

Mr. Deikman: He talked about his Communist Party—

The Court: He said he did.

Mr. Deikman: Look, your Honor, you gave us this material as being the subject matter, and this is the report, this is a composite report of his conversation we are talking about right now. Now, what we are trying to do is get back to his first meeting and see whether a statement was made at that time with which we haven't been provided.

The Court: Proceed and ask him something that relates [fol. 793] to it. I haven't heard anything that even relates to it, as I understand, and I will sustain the Government's objection to this last question.

Q. Do you remember this testimony being given: "Now, after this 15-minute conversation, Mr. Gardner, I then understand a couple of weeks later you went to the offices of the FBI. Answer: Yes, sir. Question: To the FBI office in Butte? Answer: Yes, sir. Question: Was that still in May or was that— Answer: Well, it was in that period of March or April."

Mr. Vincent: Objection, your Honor.

The Court: I do not see that identifies this at all.

Mr. Deikman: Well, they are talking about after this man came—

The Court: I think we had better proceed to some other line. I will sustain the objection.

Mr. Vincent: The last testimony of Mr. Deikman, I move that the last testimony of Mr. Deikman be stricken from the record.

Mr. Deikman: It is not testimony. I am trying to make the record.

The Court: Proceed and ask the witness some question that is relevant to what we have involved here.

Q. During this first conversation in the FBI offices in Butte do you recall whether the FBI agent or agents that you talked to took notes concerning your conversation?

A. I don't know whether they took notes or not. I saw no notes being taken.

Q. Do you know whether any mechanical transcription was being taken of your—

A. They didn't advise me of any such transcription.

Q. Was any stenographer present?

A. No, there was never a stenographer present at any of my meetings with the FBI.

Q. As a result of your conversation with the agent or agents at that time did they prepare anything in writing which they then showed you for your inspection?

[fol. 794] A. No, sir. The only thing I was ever showed—

Q. I am sorry. I am talking about right now.

A. No, sir.

Q. Did you provide them with anything in writing?

A. No, sir.

Q. Did there come a time in which you had a second con-

versation with any agent of the FBI regarding your Communist Party activities?

A. I had several meetings with the FBI in regard to—

Q. Did there come a time when there was a second one?

A. There certainly must have been.

Q. Could you give us a date on that?

A. No, sir.

Q. When in point of time from the first meeting was the—

Mr. Kelley: May it please the Court, this is wholly irrelevant. The report which we gave to them dated 10/7/55 shows that there were interviews on August 29 and 31, September 1, 9, 12, 16, 26, 27, and October 4 and 5 of 1955, and the stated purpose of this is to show that there isn't, that we haven't produced material which may have been recorded. That was the announced purpose by Mr. Deikman, and this is wholly irrelevant to that. Whether there was a second or third it is shown by the material they already have.

Mr. Deikman: I say it is not shown by this material. As a matter of fact, this material indicates that there was material taken other than this.

Mr. Crandall: Mr. Kelley, I would like to just for the record's sake, Mr. Kelley indicates there were interviews conducted on those various dates he mentioned. The face of the report would not necessarily show that there were interviews conducted. Investigations could have been conducted, but it would not—

Mr. Deikman: That highlights why we have to ask these questions.

The Court: I do not think this witness has to if he doesn't recall the nature of the very thing, I don't expect anyone could recall the precise date or the number of meetings that happened a good while ago, if at any of these meetings, ask if anything was done that would bring them in the category [fol. 795] of the report. The Government has furnished this report here. Now, you should not overlook the fact that under 3500 the Court was obliged to excise some of the report, matters that weren't relevant to his direct testimony.

Mr. Deikman: I am not overlooking that.

The Court: That is nothing in the discretion of the Government or the witness. I mean what we are trying to find

out, I apprehend, is whether there are any reports that haven't been furnished coming within 3500 or statements.

Q. In the Cleveland trial the testimony was as follows on page 812; "How long after the second meeting did you talk to them?"

The Court: What is the point, Mr. Deikman? If you will tell me—

Mr. Deikman: I am trying to place a date. July, 1956, was the date we are trying to get at. I am telling the witness it was July, 1956, just so we have a date of his conversation with the FBI and we may be able to tell him what happened.

The Court: Ask him if he met with them, whatever the date is.

Q. Did you meet with the FBI on July, 1956?

A. I met with the FBI sometime during that period, and certainly I am not sure whether it was July, whether it was August or whether it was June, but it was in that period that I had a meeting with the FBI.

Mr. Vincent: If your Honor please, the documents furnished to the defense show that Mr. Gardner furnished a written statement to the FBI in July of 1956.

The Court: The examination ought to go to something that was not furnished and not something that has been furnished. The Government points out that he made a written statement apparently on July, 1956, and you were furnished the statement.

Mr. Kelley: July 16.

[fol. 796] Mr. Deikman: I want to see if it was the same statement, because in Cleveland the examination as to July of 1956 indicated that there was a statement relating to subject matter—they went into subject matter more there, your Honor—which is different than the subject matter which appears here.

Mr. Vincent: That doesn't prove that that testimony relates to the trial.

The Court: The Court reproduced the statement; and the Court is the one that excised the matter that is not in there.

Mr. Deikman: That's right.

The Court: And the issues in the Cleveland trial may have been entirely different. I don't know what they are. There may be something different in there that would be thoroughly pertinent that would have no relevancy here to direct examination.

Mr. Deikman: That would be something only your Honor could determine, whether or not the statement he talked about in Cleveland is the same statement that was provided us here. All I can do is examine him in regard to that statement and then perhaps your Honor will be able to tell whether that is the same statement or another statement. We would not be able to tell. But I think we are entitled to go into it.

The Court: I don't know on what theory you are proceeding. Proceed. I don't see how it establishes anything. The Government has furnished certain statements. To point out what I am getting at, what is omitted from them is no question of inquiry here. The statement is furnished, and if the Court was wrong in excising parts of it, that matter is one that you are fully protected on by the record. What the problem here is, are there any statements the Government hasn't furnished that come within 3500, that is what I am trying to find out.

Mr. Deikman: So am I.

Mr. Kelley: Mr. Deikman has made the statement he of his own knowledge knows that we have statements which we have not produced. He hasn't said that they relate to [fol. 797] this testimony. I think he ought to make that statement clear, because it is a rather serious charge that he has made.

The Court: Well, if he wishes to.

Mr. Deikman: I don't think I have to at this time, your Honor.

Mr. Kelley: I think he ought to make it clear or withdraw it, because you have alleged that we have intentionally withheld material that should have been produced here.

Mr. Deikman: I didn't say intentionally, Mr. Kelley. I think you have a different interpretation of the legal effect of 3500.

The Court: Let's proceed.

Mr. Kelley: If you are making the charge that we have withheld, I think you ought to be specific about it.

Mr. Deikman: I am going to let the witness testify and not you, Mr. Kelley.

Mr. Kelley: I am not the one that wants to testify. I am trying to find out what your charge is.

Q. Do you recall in the Cleveland trial, you testified that you had a conversation with the FBI in July of 1956?

A. Yes.

Q. And what agents were present at that time?

Mr. Vincent: If your Honor please, we still don't have any relation to this trial and to this witness's direct testimony.

Q. It was in regard to your Communist Party activities?

A. Yes, sir.

Q. What agents were present at that trial?

A. To the best of my recollection it was Zoller and Hutchinson although I could be wrong.

Q. I believe you stated that in the Cleveland trial that there were two additional agents, is that correct?

A. That came in from time to time but were not inter- [fol. 798] ested in my specific testimony. They were in there for moments getting information from one or the other of the agents who were interviewing me, and to the best of my recollection they had nothing to do with my case.

Q. They at no time talked to you?

A. No.

Q. Now, at that time what took place in regard to the agents taking notes? Did they take notes?

A. Well, not to my recollection, they didn't take notes. There was a statement prepared afterward—that is the best of my recollection—of which I believe I signed.

Q. You mean that as a result of what your conversation was they then prepared a statement which you then signed?

A. Yes.

Q. Did that statement encompass any material outside of—

The Court: Wait a minute. We are not going to go into a mysterious roundabout way. Show him this statement here and ask him if that is the one he signed at this time that is here in the record.

Mr. Deikman: I would like to approach it—

The Court: If that is the statement he is talking about that you have been furnished, that is the end of it.

Mr. Deikman: We will assume that this is a reluctant witness and that he may want to cooperate with not producing all the statements, if such is the case, that would be the height of foolishness to say, to let him do it, but he can do it.

Q. Is that the statement?

The Court: I do not agree with your observations in the least. What we are looking for is additional statements. You can look at that, Mr. Gardner, and answer whether that is the statement that you signed following this meeting you are talking about here. Is that the statement you signed at the conclusion of that meeting?

The Witness: Yes, I am sure that is the statement. I only signed one statement.

The Court: And that is dated July 16, 1956?

[fol. 799] The Witness: Yes, that could very well be the period we are talking about.

Q. Didn't you testify in the Cleveland trial, Mr. Gardner, that they gave you a statement at that time relative to a case over in Butte?

Mr. Vincent: The Government objects to that.

The Court: I will sustain the objection. The statement is before you, and you have been furnished the statement.

Mr. Deikman: Well, this doesn't seem to be a statement concerning a case in Butte.

The Court: The statement has obviously had certain matters excised, and the Court did that under 3500, because it had no relevancy to the direct examination. So, the statement has been furnished as required by law as the Court sees it.

Mr. Deikman: Your Honor, I do not in any way intend to trespass on the rulings or to argue with the Court unnecessarily, but I would like to make a statement in regard to this particular point.

The Court: Well, what is it?

Mr. Deikman: Of course, the defendant doesn't know what statements have been excised. From the point of

view of observing the secrecy of the excised material we are not going to trespass on that. All we are going to do is ask him whether or not he stated in the Cleveland trial that the material which he signed then on July, 1956, was relative to a case in Butte. Then, an appellate court can look it over to see whether this is or this is not the same statement.

The Court: The Court can tell very quickly from the substance stated in there there may have been some material conceding argumentatively, but it might have some relevancy in Cleveland but it has no relevancy whatsoever in this case here. The point is that the Government is obliged to produce anything that comes within the statement category under 3500 that relates to his testimony in this case on direct, and then they can say to the Court, "This statement contains other matters that we do not [fol. 800] think are pertinent to the direct examination here or to the direct testimony," and ask the Court to excise it. So, when the statement itself has been furnished that is the end of the inquiry it seems to me.

Mr. Deikman: That's right, and I agree with everything that the Court has said. It is just that I am not going to press it further. I just want to clarify the record on it.

The Court: Yes.

Mr. Deikman: It is our position that it is possible—I am saying it is the case—that he gave them another statement.

The Court: You can ask him that. He said he didn't. That is already in the record.

Mr. Deikman: I want to refresh his recollection about his testimony in Cleveland. It may be that the excised material is the material that he referred to in Cleveland. I am not going to go further than that. I just want to get out of him whether he would say the same thing he said in Cleveland about whatever report he made. I just want the record to show as much at least as it showed in the Cleveland case about any statement he gave in July, 1956.

The Court: I think you need not go into that. The witness answered, and, if I am wrong about this, it will be corrected, that he made no other written statement, and he said at the conclusion of this meeting that you have

been inquiring about that there was a written statement prepared and he signed it, and he has identified the statement that was furnished you as being the statement. So, now go to the next episode.

Mr. Deikman: All right, your Honor.

Q. Prior to this meeting in July, 1956, and after the first meeting in the offices of the FBI in between those two times did you have any conversations with the agents or an agent of the FBI regarding your Communist Party experiences?

A. I am sure I did.

Q. Does anything come to mind as to any—strike that. Where were these conversations held?

[fol. 801] A. Well, sometimes they were held at the coffee shop, and sometimes they were held at the offices of the FBI.

Q. In any of those instances did you see any notes being taken?

A. No, sir.

Q. Did you provide any written material?

A. Never provided any written material in all my history.

Q. Any written material of any kind? Just answer my questions.

The Court: He has answered it.

The Witness: I did.

Q. Was any mechanical transcription taken?

A. There was never any mechanical transcriptions I was advised of or knew of in any meetings that I had with any FBI agents or the Federal Government.

Q. And this meeting in July of 1956, did you have any other conversations with an agent or agents of the FBI regarding your Communist Party activities?

A. I don't recall whether there was or not. I think, let's see, July, actually, I don't recall whether there was any then until recently around October in Anchorage, Alaska, when there were some conversations there. There could have been a discussion a time in between. I just don't remember. Occasionally, they would call me on some matter that had come to mind, and I would answer them on it.

Q. Do you remember testifying in the Cleveland case that you had conversations with them in August, September, October, November and December of 1956?

Mr. Vincent: If your Honor please, that still does not relate to this. We go back now again to information furnished in a case in Cleveland which has nothing to do with the case here.

Mr. Deikman: The record doesn't show that. It doesn't show anything about it except his Communist Party activities.

The Court: I do not see any inconsistency or anything else. We are not involved in that. He said he had conversations. You can ask him that. That goes to his recollection. You can answer the question.

A. As I say, there could well have been conversations [fol. 802] with the FBI during that period. Now, certainly, during that same period I met FBI agents from time to time. As I said, Butte is a small town, and there were several agents in Butte, and it was almost impossible to go downtown without meeting one of them at noon particularly or in the off hours. That happened frequently.

Q. During those occasions in August, September, October, November, and December of 1956 did any of the agents take any notes?

Mr. Crandall: He has answered that.

The Court: I think I will let him answer.

Q. With regard to conversations?

A. To my knowledge the only time the notes were ever taken—

Q. I am asking only about that period.

The Court: There is no use of taking the time of the Court to ask him about these things when he said there was never any stenographer present or any transcription taken.

Mr. Deikman: He hasn't said that.

The Court: You can answer the question about notes. There is no use of going over the thing categorically when he has made an inclusive answer. I am not sure he answered as to notes.

A. I wanted to clear that up, that the only time that notes were ever taken to my knowledge was the one time when after a conversation a statement was prepared. There was no time to my knowledge in my associations with any of the agents were any notes taken. Now, they might have gone back to the office and made notes on the basis of it or after I left the office. They may have made notes on it. I have no knowledge of any notes being made except the one time.

Q. In Anchorage, Alaska, in December of 1957 did you have conversations with the FBI regarding your Communist Party activities?

A. Yes, I had some conversations in the latter part of 1957 in Anchorage, Alaska, regarding my Communist Party activities.

Q. Did you make any statement at that time?

A. Yes, I did regarding specific individuals.

[fol. 803] Q. Was there more than one statement?

Mr. Vincent: If your Honor please—

The Court: I do not know what you mean by statement. Did he discuss this matter orally or what do you mean by statements?

Mr. Kelley: Well, even so, your Honor, it is irrelevant unless he is asking about anything that concerned his testimony on direct.

The Court: I think he did that preliminarily. Was it in the nature of a discussion or what took place, that is what he can ask. But the use of the word "statements", I do not know whether he is using that under the technical—under 3500 or he just means, did he talk about anything. You can proceed.

Q. Try to answer the question yes or no. Did you sign anything in writing there in Anchorage, Alaska, relating to your experiences in the Communist Party?

A. Yes.

Q. Was there more than one of such writings?

A. Yes.

Q. Could you tell us how many such writings there were?

A. I don't remember. There were six, seven, eight. At that time they were asking about specific individuals.

Q. I am sorry, I am not asking you, it has already been determined that we can't go into the subject matter in detail, Mr. Gardner. So, if we can't examine you as to the—

The Court: You are going to have to show that they had something to do with his direct testimony in this case. You can ask him if the subject was mentioned in the direct testimony of this case or something.

Mr. Deikman: Your Honor, that has already been established. They relate to his Communist Party experiences, and he has testified as to—

Mr. Kelley: That wasn't the subject of the direct examination at all, his Communist Party experiences.

Mr. Deikman: Well, maybe I am wrong on this, and I [fol. 804] would appreciate the Court letting me have its opinion, isn't it correct that his Communist Party experience or activity are (sic) the subject matter of his direct testimony?

The Court: Well, the testimony is here to speak for itself. I do not know what these statements are he is talking about. As I used the oft-expressed one, they may have been talking about something entirely far away from this case.

A. We were far away.

Mr. Deikman: Your Honor, we will make an argument on this later, but I will ask this question: How many individuals did the statements relate to?

Mr. Vincent: If your Honor please—

Q. —in the Communist Party.

The Court: I will sustain the objection to that. You can ask him if they related to Mr. Travis.

Mr. Deikman: I think that calls for a conclusion on the witness's part.

The Court: Well, I don't know. The other would call for a conclusion too, if you ask him specific names. We are not going into any investigation he made about Joe Doaks or Jim Smith or something unless there is some relevancy in connection with this case.

Mr. Deikman: I think it is for the Court to determine whether it is within the subject matter of this case and not the witness.

The Court: You can ask him if any of them pertain to Travis, of course.

Mr. Deikman: Your Honor—

Q. At that time do you recall whether any of the statements mentioned Mr. Travis?

A. None mentioned Mr. Travis.

Q. Do you recall whether any of the statements mentioned anybody who was employed by Mine-Mill?

[fol. 805] Mr. Vincent: We object to that.

The Court: I will sustain the objection.

Q. Do you recall whether the statements mentioned anyone concerning whom you have testified in this court?

Mr. Vincent: We object to that, your Honor. That question is too broad.

The Court: I do not know—

Mr. Kelley: Unless it related to an incident that he testified about.

The Court: Unless he testified to something that related to them. I think he can answer that question.

A. I don't recall any of the statements related to anybody I testified to here in court. There were several statements, and the statements were about specific individuals and not actually about activities. The activities were only incidental to the statement, and I recall none that might have related here although I say, again, that is the best of my recollection. I can't recall a thing—

Q. In other words, to the best of your recollection it might relate to—

The Court: No, he didn't say that.

A. To the best of my recollection it doesn't relate to anything testified here in court.

Q. Your answer, in other words, to that, if I understand it, is, "I don't recall—"

The Court: The answer is here. You need not translate it. The answer will stand. You can argue it. That is just plain argument.

Q. What is the name of the agent with whom you conversed and gave a statement at that time?

Mr. Crandall: Objection, your Honor.

[fol. 806] Mr. Vincent: That is not material. He hasn't shown that that relates to any of these in this trial.

Mr. Deikman: I am prepared to argue it now if you want me to.

The Court: Yes.

Mr. Deikman: I think it requires a reading of your— May I use your copy, may I use your copy of the Act?

Mr. Vincent: Surely.

Mr. Deikman: I think it requires a reading of Section 3500 very carefully, your Honor. I know we have gone over this act before, and I am not trying to repeat arguments that have been made before, but I think it is clear from this Act that, "after a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United States to produce any statement of the witness in the possession of of the United States which refers to the subject matter as to which the witness has testified." Then the Act provides that, "If the United States claims that any statement ordered to be produced under this Section contains matter which does not relate to the subject matter of the testimony of the witness, the Court shall order the United States to deliver such statement for the inspection of the Court in camera." And then it is up to the Court to determine whether or not that statement does relate to the subject matter, so that my point is this: It is not up to the United States Attorney to decide whether or not statements relate to the subject matter, but this Act requires the production of all statements made by the witness to any agent of the Government, all statements regardless of whether it does relate to the subject matter or not, because it is up to the Court to determine whether it relates to the subject matter. That is why this provision is in the Act providing that the Court shall inspect the

statements to determine whether or not the statements contain material falling within the subject matter.

So, by Mr. Kelley stating that these statements do not relate to the subject matter, he is violating the intent and purport of this Act. Now, Mr. Kelley took somewhat offense when I said similar statements as to this earlier. I think [fol. 807] it is clear now. I am not saying Mr. Kelley is being intentionally deceptive. I am saying that he is interpreting the Act differently than we are, and I think we are interpreting the Act correctly. The Act requires the production of all statements made by the witness to any agent of the Government, and then it is up to the Court to determine whether it falls within the subject matter.

Now, we have just had testimony on the part of this witness that he has made statements to an agent of the Government. He does not recall, he doesn't think that he gave any material relating to this case, but he doesn't recall whether he did or not.

The Court: That is not my understanding of the testimony at all.

Mr. Deikman: I would appreciate it if that were read back.

The Court: He said they were far distant and unrelated to the subject matter of this case.

Mr. Deikman: That is a legal conclusion on his part. It is up to your Honor—

The Court: The unreasonableness of your position is so apparent to me that I do not think you need to argue it any further. If you take the case of an FBI Agent, I mean an operative, or whatever they are called, he probably in the course of ten years would make 100 investigations and make 100 reports on 100 different detached cases. Now, if you take your analogy here or your argument, the Government would be obliged to produce 100 reports on 99 cases that had nothing to do whatever with the transaction that was under investigation, and then according to your theory the Court from the 100 absolutely detached cases would have to say, "Well, this has nothing to do with this." In other words, according to your analysis every report that anybody ever made about anything would have to be produced, and I do not think that

is the purpose or the theory or the intent of the law. It has to be with respect to something under the statute that relates to the witness's direct examination, and, if the Government had an FBI Agent that today investigated a Post Office robbery in Los Angeles and last week was in-
[fol. 808] vestigating a sale of some money orders or something in Palm Beach, Florida, and we have a trial here involving a Post Office robbery in Denver, I think that would not of necessity be produced. But using that for analogy they would not have to produce these Los Angeles and Palm Beach, Florida, reports to the Court at all. It would be on matters that relate to the subject here. So, I do not think there is any basis for that argument at all.

Mr. Deikman: With all due respect I do not think the analogy you suggest applies, because we are not asking for all statements that an FBI Agent has relating to all his investigations. We are asking for all statements made by this witness.

The Court: Well, but the statute says pertaining to his direct examination here. The witness has expressly testified that these were not connected with any matters mentioned in this case or were entirely in another field.

Mr. Kelley: The Judge's analogy is a perfect example. If the FBI Agent were going to testify, say, on a Dyer Act that he had investigated and he investigated 100 other Dyer Act cases, under your argument we would have to produce the 100 other investigative reports on other Dyer Acts that were not related to this violation that is on trial.

Mr. Deikman: At no point in your analogy do you mention anything about a witness in particular.

Mr. Kelley: The FBI Agent is the witness. They testify.

The Court: Where an FBI Agent was called, just to illustrate the absolute unreasonableness of your position—

Mr. Deikman: That analogy falls down, because the FBI Agent would be—obviously would not be giving reports to himself. We are asking about reports made to a particular FBI Agent. I haven't been allowed to ask what the name of the agent was, and that is the question we are coming to. But I submit, your Honor, that a correct interpretation of what this witness has said, and I ask that his testimony be read back by the reporter, is that he

does not recall having given any statements regarding persons mentioned in this trial which the reverse is that it might have been mentioned in the statements but he doesn't [fol. 809] recall. Now, he didn't say that he didn't give them any statements in regard to persons who were mentioned in this trial. He said he didn't recall whether he did or not.

The Court: The evidence is here. Proceed if you have any further questions to ask him. The question I think was with what agent he talked on that occasion. The Government objected to that. What is the basis of the objection to that?

Mr. Kelley: We don't care if he gives the name of the agent.

The Court: I think he can answer the question, what agent it was you had these talks with up in Alaska.

Mr. Kelley: The whole line of questioning is irrelevant.

A. I met this fellow once. I think his name is Cochran. I do not recall his first name, but I am fairly certain of his last name. I gave him no statement relative to this trial.

Q. Now, subsequent to— I beg your pardon. I didn't hear that last answer.

Mr. Kelley: He said he gave him no statement relative to this trial.

Mr. Deikman: For the record I move that answer be stricken, because the opinion is an uncalled for opinion and conclusion.

The Court: The answer can stand. The objection is overruled. He has testified to the same thing I think several times, but proceed.

Q. Now, subsequent to your giving the FBI statement in December of 1957 in Anchorage, Alaska, did you have any other occasions to have conversations with the FBI regarding your Communist Party experiences?

A. No.

Q. Now, you have testified that you testified in the Cleveland conspiracy case previous to the testimony in this

case. Were there any other criminal cases in which you have testified?

The Court: Well, do you mean along this line, or do you mean some burglary case or what do you mean?

[fol. 810] Mr. Deikman: This is preliminary. I will ask him next—

The Court: I do not think the witness is obliged to go back through his life where he has testified in dozens of criminal cases. You have got to point it up and have something more specific than that.

Q. Other than your testimony in Cleveland and this case has your testimony been elicited in any criminal case regarding your experiences in the Communist Party?

Mr. Vincent: We object to that. It is the same question in a different form. It means the same thing.

Mr. Deikman: It relates to the Communist Party, and that is the subject matter.

Mr. Kelley: No, that wasn't the subject matter of his testimony.

The Court: I do not think it was either.

Mr. Kelley: That is where the false premise is.

The Court: I would not say it was the subject matter of his testimony.

Mr. Deikman: It is not the entire subject matter. We are not making that contention.

Mr. Vincent: Does that include state court, city court, JP courts?

The Court: Why don't you ask him if he has testified in any case that involved alleged violations of the Smith Act or Taft-Hartley Act and get it down to some area?

Q. Will you answer that question?

A. I testified in Cleveland in the conspiracy trial there, but I—I don't quite understand the question. Does that include grand juries that I previously testified to?

Q. No, just open trials.

A. Yes.

Q. Does that complete your answer?

A. Yes.

[fol. 811] Q. Now, you also testified that you appeared before the Denver Grand Jury in the summer of 1956, the

Cleveland Grand Jury in January of 1957, and the New York Grand Jury in December, 1956 or around that time. Were there any other grand juries in which the subject of inquiry was a violation of the Taft-Hartley Act, the Smith Act or any other act of that kind before which you appeared?

A. No, sir.

Q. Previous to your appearance before the Grand Jury in the summer of '56 in Denver did you have any conversations with any attorney for the United States Government regarding your Communist Party experiences?

Mr. Kelley: I object to that as irrelevant whether he talked to attorneys or not.

The Court: I think I will let him answer the question.

A. I am not sure that I understand it. Is the question, did I talk to any attorneys for the United States Government prior to my coming to Denver?

Q. Yes, and I will add onto that in relation to your testimony before the Grand Jury.

A. Yes, I did.

Q. Now, was that one attorney or more than one attorney?

A. I think there were probably two attorneys that I spoke to at a couple of different times.

Q. Do you remember their names?

A. One of them was Mr. Broome, but I can't remember the other fellow's name.

Q. Would it refresh your recollection to mention the name of Mr. Heflin?

A. Yes, I believe that is the other one.

Q. On how many occasions at that time did you see those attorneys?

A. Well, there were probably two or three different occasions that I seen them. I was asked to come here to Denver, and I talked to them here in Denver.

Q. How long did your conversations last on each day?

A. Oh, gee, I don't remember, probably a couple of hours, maybe longer. I don't remember.

Q. It was—did you observe Mr. Broome taking any notes?

A. No, sir, I never have observed Mr. Broome taking notes. He has a terrific memory.

Q. Did you observe Mr. Heflin taking notes?

A. No.

Q. What about Heflin, did he take notes?

A. Not to my knowledge he didn't. What he did after he left me, of course, I have no knowledge.

[fol. 812] Q. When you said that you had never provided anything in writing to any FBI Agent did you also include in that answer a blanket statement in regard to United States Attorneys?

The Court: Ask him the question.

Mr. Deikman: I didn't want to go back over the same question.

A. Yes, I never gave any United States Attorney anything in writing.

Q. Well, did they ever—did Broome and Heflin on this occasion prepare anything in writing and return it to you, submit it to you for your inspection?

A. Not that I can recall. I am sure they didn't.

Q. Now, your answer before about mechanical transcriptions and stenographers, would that apply to the United States Attorney?

A. That would definitely apply.

Q. In other words, that is a blanket statement in regard to any agent of the Government?

A. Yes.

The Court: This testimony about these Alaska statements, I want to see or give consideration to whether there is anything in those that the Government might be giving some thought to the subject of those, I don't know, I want to see the testimony. It would be my impression the testimony shows that in the witness's judgment at least they are entirely unrelated to this thing here and so forth and so on. He made some answer about, I am not certain about that phase of the answer, and, if there is any possibility that they would have anything to do with this, it might be advisable to produce them. You can be thinking about that and be able to state your objection.

Mr. Kelley: All right.

Mr. Witt: Your Honor wants to come back at 1:15?

The Court: Yes, and I will tell you what I think about this other business.

Mr. Witt: Just to clear the decks on that, I said I was going to check on that one thing. I have, and I am withdrawing that problem, so, the only problem we have relates [fol. 813] to the citations I gave you on the problem of the Hod Carriers.

The Court: Going to that matter of specific questions about the relationship between these two unions?

Mr. Witt: That's right. Then, your Honor, also we would like you to tell us at 1:15 how you feel about our use of these documents, because it is our present intention to use them freely without restriction.

The Court: Before we recess today I will get to that.

Mr. Witt: All right. If your Honor can do it at 1:15, because I may have someone working on them this afternoon.

The Court: Will someone leave me a copy of this Cleveland transcript among other things?

Mr. Kelley: They are the only ones that have it.

The Court: Where it indicates there is any restriction on the use—

Mr. Vincent: This is only the portion pertaining to his testimony.

The Court: Another thing I wanted the Government to do, I do not know whether they can do it between now and 1:30, is to check and see if they can find out about any other cases in which this problem has come up and what was done.

Mr. Vincent: I will check on that.

The Court: If you gentlemen can find out anything, that goes for you too.

Mr. Witt: We have given you the conclusive precedents on that.

Afternoon Session 1:15 p.m.
In Chambers

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Kelley: There is one thing that might be in order at this point. Mr. Deikman has made the allegation that

[fol. 814] the United States had statements in its possession relating to the testimony of the witness Gardner which it had not produced to the Court, and there were statements made by the witness Gardner in Anchorage, as he stated, which we maintained have no bearing on his testimony on direct examination, but we want to submit them to the Court because of the charge that has been made and ask the Court to examine them, and, if the Court feels they belong in the record at all, that they be sealed. However, we feel that they are so remote that there would not even be any reason to seal them, but we would like to submit them to the Court before they continue with their cross examination so that the Court—

The Court: You have them physically available?

Mr. Witt: Before the cross examination in Chambers you mean this afternoon?

The Court: Yes, that was this morning.

Mr. Kelley: That's right.

Mr. Deikman: May I say a word for the record? It seems to me Mr. Kelley is being unduly touchy about my reference to their possession of statements. I do not know how many times I will have to repeat it to convince Mr. Kelley, but I was not in any way attempting to allude to any impropriety on the part of Mr. Kelley or any United States Attorney. All I was doing was pointing out that our interpretation of the statute obviously is much different than Mr. Kelley's, and under our interpretation these statements should have been provided to the Court. There are no charges in any way.

The Court: I think mechanically what we had better do, I want to get rid of the Jury since we know we are going to have a short session with them, and then you can give me the statements, I can look them over, and then when I have completed looking them over and decide about the matter we can come in Chambers, and I will announce what my views are then about the matter.

Mr. Kelley: Suppose that Mr. Deikman's interpretation should be right and mine wrong, they might want to use them if you gave them to them on cross in open court.

[fol. 815] The Court: Well, there may be some sense to

that. While the Jury is here maybe we had better let the Jury sit around and you can give me the statements, and I will look at them right now.

Mr. Deikman: There will be other statements that I believe, now, in this case I don't know, but I believe we will be able to show through Mr. Gardner that exist other than those in Anchorage.

Mr. Kelley: You may be referring to some notes that were taken by an attorney on the Cleveland case.

Mr. Deikman: I didn't come prepared to argue this thing in Chambers. My recollection is—

The Court: How long is it going to take to develop this thing that you think you can develop by examination of Mr. Gardner?

Mr. Deikman: About 20 minutes.

The Court: As much as I dislike to have the Jury sitting around I think we had better do that if there are some other things and get Mr. Gardner back in here. They suggested the possibility of anything that ought to be produced. You ought to know before you cross-examine him in court.

Mr. Witt: May I finish off my problem so I can get ready for open court while you are getting ready for this other thing? I would like to go ahead and prepare especially since this Hod Carriers problem is—

The Court: I have concluded after looking the whole matter over that the Court was wrong the other day in letting the matter be gone into. Apparently it is the view of the defense that ill will of the witness against the defendant in this case, Mr. Travis, might be inferred from the circumstance that there is some rivalry between the Mine-Mill Union which formerly employed Mr. Gardner and with which Mr. Travis was associated and the Hod Carriers Union as has been referred to with which Mr. Gardner is presently associated and employed. I think, as I mentioned at the time this thing, this problem came up in connection with the testimony of the witness Eckert, that any pos- [fol. 816] sible inference that might arise from that circumstance is too remote to be considered in this case. Mr. Travis is the defendant in this case, and the ill will that can

be shown is a personal ill will between the defendant and Mr. Travis, and their respective association with these unions I think would be getting out into the collateral fields.

So, what I am going to do is instruct the Jury that they disregard all of this testimony about the rivalry between these two unions.

Mr. Witt: In view of that, your Honor, and to preserve our record on it may I say this: Since you have gone back to the witness Eckert and referred to the distinction between the personal rivalry and the union rivalry, if we were permitted in the cases of both Eckert and this man to go into it, we would show in the case of Eckert he was and has been personally involved in the rivalry between the UAW and Mine-Mill, and in the case of Mr. Gardner that he also has been personally involved, and, in fact, if we were permitted to go into this, your Honor, I would be getting back to what Mr. Gardner said yesterday about the discussions between the Hod Carriers and Mine-Mill about merger and show that Mr. Gardner personally played a role in that in top level discussions in 1956 after he became associated with the Hod Carriers, and he had, we would ask him about a conference that he, Mr. Gardner had with the Secretary-Treasurer of Mine-Mill, the present Secretary-Treasurer, Mr. Pezzati, in the Hotel Finland in Butte in 1956 at Mr. Gardner's suggestion or invitation to Pezzati so that both in Mr. Eckert's case and in Mr. Gardner's case we could show personal involvement.

The case I referred to this morning or, rather, the Wigmore sentence I referred to this morning from Section 953 referred to the fact that you could show bias by nature of employment. This goes much further than that, not merely by employment, but we could show in the cases of both of these witnesses, and we will have the same issue with respect to Mason, the same issue with respect to Horie, that all four of these people have been personally involved in attacking Mine-Mill, attempting to destroy it, and doing everything they can to hurt Mine-Mill and to injure the officers and former officers of Mine-Mill including Travis.

The Court: Of course, your own statement of the thing I think illustrates better than anything I could say about [fol. 817] the collateral issues that would be involved in going into this thing. The Mine-Mill & Smelter Union is not on trial in this case in any sense. The antagonism between the unions whether it exists in fact or whether it doesn't is not anything that would relate to this case. If it was a case, say, that involved rights between them, there might be some basis for it. Mr. Travis is individually a defendant in this case, and the only possible basis for showing any feeling on the part of a witness who appears for the Government must be limited to a personal feeling with respect to the defendant, and these matters as your own synopsis of what you are trying to do shows, would indicate that it would not establish any personal animosity at all or personal feeling as against the defendant. So, I think the Court will, as I say, instruct the Jury to disregard this episode in this witness's testimony.

Mr. Witt: I am sorry, your Honor, just this one word if you will permit me, I don't want to press it, your Honor has made his ruling, but to make the record on it, as we see it, and as we know it, not only from this case, we know it from what we know about the witnesses before the Grand Jury in the conspiracy case pending before your Honor, we know it from the very extensive proceedings which have taken place before the SACB, that the people who have appeared as witnesses for the Government against Mine-Mill as such or against people like Travis affiliated with Mine-Mill or officers or past officers, practically all are people in the labor movement and concerned with destroying Mine-Mill, and the way we see it is that not only in this case but in other cases there has been cooperation between the Government and specifically the FBI and these people like Gardner and Eckert and Mason and Horie, Ortiz, if they produce him, to destroy Mine-Mill, and if in order to do that to get a conviction of Mr. Travis, these people like Mr. Gardner will cooperate in that enterprise.

The Court: Now, is there any point—

Mr. Kelley: I think it ought to be cleared for the record that this citation that Mr. Witt set forth of Wigmore, Sec-

tion 953 doesn't relate to what he is talking about at all. It relates to prior utterances of the defendant, not relationship of unions or anything else.

The Court: No. As a matter of fact, I didn't think it was [fol. 818] necessary to get into the legal argument on the thing, because I am satisfied the whole thing is collateral, but I don't believe that that citation would justify the course indicated anyway, but I am going behind that. I think it is entirely collateral, going into collateral matters, would just open up the field for something entirely collateral to the thing, and there are no inferences, considerable inferences that could be developed in the thing at all. But let's go to the next point. What is the next point?

* * * * * * * *

[fol. 821] Mr. Witt: But I am not going to come back to the subject. I think that takes me out of the picture for the time being. Just so we will be clear on the procedure aside from statements under Section 3500 we have the problem of making the record with respect to our position on grand jury testimony. May we preserve just that part of it until after we have finished with the open court cross examination, because we may get something in there? He will complete his cross examination now, but we want our opportunity to state our position on that after we are done with Gardner in open court.

The Court: I guess that is the position, but, still, if there is going to be any production, I do not know what will develop. I think we had better go through everything here on the testimony level so we know if there is anything that is going to be asked to be produced. That is to be the end of the examination of this witness except for—or there may be further examination in here, but at least we do not want to have to go back before the Jury with this witness.

Mr. Witt: We understand it, but we want to come back in Chambers and make our motion on grand jury testimony.

The Court: We will see how we progress on that, and then we will work out some satisfactory plan.

Mr. Deikman: May I proceed?

The Court: Yes, you may proceed.

FRED GARDNER, testified as follows:

Examination.

By Mr. Deikman (Continued):

Q. Mr. Gardner, did you have occasion to speak to an attorney for the Government by the name of Greenhalgh—[fol. 822] I do not know if I am pronouncing that correctly—on or about October, 1956, respecting your activities in the Communist Party?

Mr. Kelley: The Government objects to that on the basis of the form of the question.

The Court: I will sustain the objection. I think you have to, as I say, I think you are going to have to, and I think it has been generally accepted that the precise details of the matter, of the statement or of the conversation should not be gone into, but there should be sufficient indication that it had something to do with this case.

Mr. Deikman: All right. In other words, you are sustaining the objection because I say respecting the Communist Party?

The Court: You can say relating to Travis or relating to the subject matter of this case or something like that.

Mr. Kelley: His testimony.

Mr. Deikman: We take the position, your Honor, that his activities or experiences or history in the Communist Party relate to the subject matter in the Travis case.

The Court: I do not know what you mean by that. That is the trouble. I do not know what you mean by it. I can think of a hundred things. He might have gone to a specific meeting, say, which had no relation to this and testify about what happened there that would not by any remote theory be connected with this case and still come in that category.

Mr. Deikman: In this case he testified that he joined the Communist Party at such and such a date, he gave reasons why he joined the Communist Party, he spoke of his experiences unrelated to Travis in the Communist Party. The Government thought it was material, they regarded it as part of the subject matter of his direct examination, for

that reason it is in the record, and we regard it now as something that we can go into as the subject matter of his testimony pertaining to this case.

Mr. Kelley: I do not think you can point any of that out in the record. In the first place, all we covered on his Com- [fol. 823] munist Party business was that he was a member from about 1933 until 1955. The testimony didn't name anybody as being a member of the Communist Party. The only reference to Mr. Travis being a Communist was in the words of Mr. Travis brought out in these conversations he had. The witness was not even asked if Mr. Travis was a member of the Communist Party. There is no background, no reason why he went in or anything in that manner in the direct testimony.

Mr. Deikman: Mr. Kelley neglects to mention that they also brought out on direct examination when he left the Communist Party, and the FBI reports which have been provided or statements under Section 3500 go into how he was expelled from the Communist Party if he was.

The Court: You can ask him if it related to any of those subjects. That is exactly what I am pointing up, not just the field of activity but if it relates to anything that relates to this record here in the matter, why, ask him specifically about it.

Mr. Deikman: May I ask him first about having talked to Greenhalgh and that is just preliminary, and we will get down to the subject matter?

Mr. Vincent: If your Honor please—

Mr. Deikman: It is too long a question, your Honor, I do not have that high mentality to be able to think of sequence after sequence in one sentence, but I will try.

Q. On the occasion that—strike that. Did you have occasion to talk to an attorney for the Department of Justice by the name of Greenhalgh in which the subject of your conversation in part was your joining the Communist Party of the United States or your expulsion from the Communist Party of the United States or the dates related thereto in October of 1956?

A. Well, the only thing that I recall in the discussions with Greenhalgh at that time—

Q. I am asking you whether you did or not.

A. I cannot answer the question by telling you that at that time I discussed with Mr. Greenhalgh the matters that were testified to in the Cleveland conspiracy trial. Now, I don't know if there were any of the fringe things, and I [fol. 824] doubt very much if there was, that was discussed there. The main subject of discussion with Greenhalgh was what I testified to in the Cleveland trial.

The Court: Well, there is no use of going into this until you show something in the nature of a statement. Ask him, was there any transcribed, was there anything written down or anything else. I mean just a conversation even about some matter in this case would not be producible. Go ahead with that question and develop what happened.

Mr. Deikman: I will make that the next question.

The Court: All right.

Q. In preparation for the trial which you have just mentioned did you have occasion to see notes prepared by anyone, any agent of the Government in relation to your testimony in the Cleveland trial?

Mr. Vincent: The Government objects to that.

The Court: I will sustain the objection, because I don't think the question says what Mr. Deikman intends it to say. I mean you can ask him if any notes of his interview were made and submitted to him, if they had any and produced any notes of his own interviews. I mean the implication there in your question, as I understood, might be with respect to somebody else's testimony entirely.

Q. Did you follow the Court's question?

A. I can say this: that I of my own knowledge I know of no notes Greenhalgh made. He submitted none to me and was not sitting with a pad and pencil, so, I don't know whether he made notes or not.

Q. Did you see any notes based on your conversations with Greenhalgh?

A. No, sir, I saw no notes based on my conversation with Greenhalgh.

Q. Don't you recall testifying in the Cleveland case that you did see notes which in your opinion were based on your conversations with Greenhalgh?

A. Yes, sir, but not notes of Greenhalgh.

Q. That was my question. That was my previous question. Perhaps you misunderstood it. You did see notes [fol. 825] based on your conversation with Greenhalgh?

A. Yes, sir, Mr. Canary had a half a page of questions that he raised.

Mr. Vincent: If your Honor please, we still have nothing to connect this with the Travis case in Denver, Colorado.

The Court: Let him go ahead, and we will get to that.

Q. Did you read those notes?

A. No, sir, they were on the table there, and he made the notes while he talked to me.

Q. Don't you recall testifying in the Cleveland trial that you did read those notes?

A. No, sir, I don't recall. I seen the notes.

Mr. Vincent: Objection, your Honor.

The Court: Well, I mean the way to ask him, if you have a specific question, not your synopsis of it. If he testified to that, why, of course, that would go to his credibility I expect. If you have anything there that would indicate that, in fairness to the witness you can ask him about it.

Mr. Deikman: All right, your Honor.

Q. So this appears on page 832 of the Cleveland transcript—

Mr. Kelley: Is this cross or direct?

Mr. Deikman: Cross.

Q. So, the half page—

Mr. Deikman: May I point out to your Honor that he just referred to this half page.

The Court: I assume that is what he is talking about now.

Q. "Question: You do not know whether or not it was the material you gave in Chicago? Answer: Oh, I don't know—I have talked about that a lot. It could be. It could be based

on things I talked about here too. Question: That is what I want to know, what you testified here today, was that the material? Answer: Yes. Question: On that page or half [fol. 826] page? Answer: Yes. Question: You did read it? Answer: Yes. I looked at it." Later on he says that he doesn't read very good but he remembers reading it.

The Court: I think you can go ahead with your questions here.

Q. Do you recall that testimony?
A. Yes, I do.
Q. And that testimony says that you did read it.

The Court: You need not repeat what it says. You can ask him if he gave that testimony.

Q. You did give that testimony?
A. Yes, that's right, but to me when I look at a thing, you can accuse me of reading it, but the point I am making now is I didn't go down, word for word, and read that half a page over. I sat there while they were asking me the questions, I knew what it contained in a general sort of way, and I certainly had every opportunity to look at it and to read it if I wanted to.

Mr. Deikman: Your Honor, just a moment. I will clear that up.

Mr. Kelley: May it please the Court, it appears obvious—

The Court: Just let him complete the testimony and argue the point afterwards. Continue, Mr. Deikman.

Q. Now, did that—did those notes that you looked at relate to your history in the Communist Party?
A. No, sir.

Mr. Kelley: I object to the form of the question.

The Court: I will sustain the objection.

Mr. Deikman: Well—

The Court: I do not know what you mean by that frankly, and I don't know how the witness could know. I don't understand what you mean "the history of the Communist Party". I don't know what that means.

[fol. 827] Mr. Kelley: It could cover his life from '33 to '55.

The Court: It could cover books he read and a hundred other things.

Mr. Deikman: I am using his language in the Cleveland trial.

Q. Do you recall giving this answer as to what it related to: "The subject matter here had to do particularly with my history in the Communist Party"?

A. I don't remember.

Mr. Deikman: That appears on page 836.

The Court: Let's go ahead and develop whether there is anything that comes within the statement category.

Q. Did the notes that you looked at relate to your joining the Communist Party?

A. The only thing I remember about the notes is that they related to the subject matter I testified to in Cleveland. They pertained to that, and they pertained to my activities around Cleveland.

Q. Did it relate—

A. And my history, if you want to put it that way, in the Communist Party around Cleveland.

Q. Did it relate to your joining the Communist Party?

A. I don't remember. I can only recall in a general way what I knew of the notes.

Q. Did those notes relate to your being expelled from the Communist Party?

The Court: Ask him if there was a statement, and then we can come back to this if it is relevant. Up to date apparently these notes were made by some lawyer in the case of preparation for the trial. I haven't held that those notes normally didn't come within the category of per se. If he did something that brought them under the statute, that is different, but I assume he could talk to a lawyer about anything and it would not be subject to production unless it comes within the statement of definition within the rule no matter what the subject matter.

Q. How did you happen to see those notes?

Mr. Vincent: I object to that.

[fol. 828] Mr. Deikman: For crying out loud—

The Court: Let him answer the question.

A. I seen notes. I seen the notes, because the United States Attorney there was questioning me regarding what my testimony would be in the Cleveland conspiracy trial, at least in part. Now, there were other questions at other times, but on that day the United States Attorney was questioning me relative to what my testimony would be.

Q. And he showed you those notes?

A. No, he didn't show them.

Q. Relative to what your testimony would be?

A. No, he didn't show them to me. He was making them there, and they were on the table there for me to see if I wanted to, and I picked them up.

Q. Did what you looked at reflect your—what you told him?

A. I think it did, but frankly, his writing is very poor, and I could not read half of those notes myself anyhow. They were very brief notes, and I suppose they were in a language that he could understand, but it would be hard for somebody else to understand.

Q. Well, didn't you testify that these were notes prepared as a result of your conversation with Greenhalgh in Chicago?

A. They were notes that were prepared for the Cleveland conspiracy trial, and Greenhalgh's discussions with me were on the same line, that's correct.

Q. They were prepared based on your conversation with Greenhalgh in Chicago you testified—

Mr. Vincent: I object.

The Court: I didn't know he did. I didn't hear him testify to that.

Mr. Vincent: Is that testimony here, Mr. Deikman?

Mr. Deikman: The problem is, I wanted to get into the fact he talked to him in Chicago and that he then saw these notes which were prepared on the basis of his testimony in Chicago, but—

The Court: To bring it up to date, it is perfectly simple to me they were simply the work notes of the lawyer made in

[fol. 829] the preparation of his examination of the witness. Unless there is something beyond that that brings them under 3500, why, that is what I am interested in, is where they come under 3500. I assume that practically any counsel that tries any case talks to a witness, and he may make notes of his own to guide him in his examination of the witness, and that sounds like what these are to me up to date. If there is something else you want to show about that, let's proceed to that.

Mr. Deikman: May it please the Court, the witness has just testified that Mr. Greenhalgh was preparing it, writing it in his handwriting right then and there.

The Court: When did he say that?

Mr. Deikman: Isn't that what you just said?

The Witness: No, definitely not.

Q. When were those notes—were those notes prepared in your presence?

A. Those notes were prepared on the basis of the questions that the United States Attorney was asking me at that time in preparation for my testimony at the trial.

Q. In other words, they were prepared in your presence?

A. Oh, yes.

Q. Right then and there?

A. Right then and there.

Q. In Cleveland?

A. Yes.

The Court: But they were the notes of the attorney in preparation for the interrogation.

Mr. Deikman: Your Honor, I would like to—

The Court: Put it this way: There wasn't any contemporaneous writing down of what the witness said, that is the point I am trying to make, according to all the testimony I have heard.

Mr. Deikman: I don't mean to be disrespectful, I think you are anticipating what I am getting at.

The Court: I am not.

Mr. Deikman: I am trying to show that he is now testifying that those notes were prepared in his presence in [fol. 830] Cleveland, and in the Cleveland trial he said that

they had already been prepared, that they were based on his statements to Greenhalgh made in Chicago.

The Court: Ask him about that. I do not know what he said in Cleveland.

Mr. Deikman: That is what I would like to go into now.

Q. Do you recall the following testimony on page 831 of the Cleveland transcript: "Question: Did you have any opportunity to see any of the notes that Mr. Greenhalgh had written out at your meeting in Chicago? Answer: No, sir. Question: Never saw any notes? Answer: No, sir. Question: And that is including to this date? Answer: Well, I don't know. I have looked at some notes with reference to this case, but it wasn't necessarily notes that was taken in Chicago, and they were very few and very brief. Question: The notes in Chicago? Answer: Yes. Question: The notes that you say you saw here in Cleveland, what day did you look at them? Answer: I, oh, I imagine about a week ago. Question: Do you recall how many pages of notes there were? Answer: About half a page. Question: About half a page? Answer: Yes. Question: Would that have been the subject matter—"

The Court: You have been over that already. You read that a while ago.

Mr. Deikman: One more question and answer.

The Court: All right.

Q. "Question: Would that have been the subject matter of which you testified in Chicago with him? Answer: It could be, yes, some of it." Do you recall giving that testimony?

A. Very definitely, and that is the same thing I said here.

The Court: I don't see any inconsistency with what he said here. That is what I would like to have you point out.

Mr. Deikman: This testimony—I may be misinterpreting it; your Honor can correct me if I am—says the notes were based on his discussion in Chicago.

[fol. 831] The Court: It doesn't say that to me at all.

The Witness: No, sir, that is not what I testified to.

The Court: I do not think that is what he said at all. Let's go on to something else.

Mr. Deikman: All right.

Q. Did those notes that you looked at in Cleveland relate to anything regarding your being expelled from the Communist Party?

A. All I can remember at the moment is that the notes had to do with some testimony at the Cleveland trial. Now, the notes were extremely brief, and most of them was impossible for me to decipher, they were in a language and in a way in which I suppose the attorney understood what they was, and I didn't—so, I don't know whether they contained it or not. My feeling is they did not, because they were very brief notes and had to do mainly with meetings that took place around Cleveland.

Q. You testified just now that the notes had to do with your testimony in the Cleveland trial. Therefore, I will ask you whether your testimony in the Cleveland trial ever mentioned Mine-Mill.

The Court: You need not answer that question. If necessary, the Court can look at the testimony, but I do not see its relevance. What we are interested in is his testimony here. Furthermore, I point out again, and I am not trying to hurry you or do anything, let's get to some point along the line where you bring this thing under 3500, whatever it was.

Mr. Deikman: I think we have, your Honor. We are prepared to develop that right now.

The Court: Go ahead with whatever you want to develop in an evidentiary way, and we will argue it out.

Mr. Deikman: I point to that in order to bring out this particular episode with Greenhalgh. Now, I will get back to what I was getting into before the recess.

Q. Previous to your testimony before the Grand Jury in January, 1957, in Cleveland—

[fol. 832] The Court: Let's stay with one—you are talking now about some statement that he made to this gentleman, and you are apparently asking for the production of it. Complete your testimony with respect to that one thing and let's get that out of the way.

Mr. Deikman: All right. I believe I have completed my testimony as to that one thing, and, if you would like, I will state our position on it.

The Court: Tell what you think you have developed that makes it proper to indicate that that is a statement under 3500 and should be produced.

Mr. Deikman: Under Section 3500 a statement is defined as, "A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government."

Now, in the first place, here is a transcription of his statement. He says that it was prepared in Cleveland in his presence, notes were made, it appears that these notes were in relation to his testimony which obviously had to do with a Taft-Hartley case in which his Communist Party experiences were material, they were taken contemporaneously with his statement according to his testimony, they were made to an agent of the Government. This agent of the Government happened to be a United States Attorney, but we contend that a United States Attorney is no less an agent of the Government by virtue of the fact that he is a United States Attorney. Mr. Kelley has said that under the rule of the Supreme Court case of Hickman vs. Taylor statements on the part of an attorney—

The Court: Let's not get into that. I am interested in what would bring it under the statement. The section you are relying on implies a literal transcription by some process, mechanical or otherwise, of what the witness says in his statement. Every word of his testimony is to the exact contrary of that, as I understand his testimony. Let's get to the testimony. He says that these notes that he saw were made by this lawyer to guide the lawyer in his interrogation of this witness and were in the language of the lawyer and didn't profess to be a verbatim statement of what this witness said. Now, the Section you are relying [fol. 833] on implies absolutely verbatim statement made contemporaneously by one of these processes of recording. Where is there any evidence that brings it under that section?

Mr. Deikman: The only exception I take to your statement is "absolutely verbatim". It says substantially verbatim. If I could see the Act for a minute.

Mr. Kelley: It says substantially.

Mr. Deikman: I feel what the witness has testified to is a transcription which is a substantially verbatim transcription to an agent of the Government and recorded contemporaneously with the making of such oral statement.

The Court: I do not think the evidence so establishes, and on that basis the request for the production relative to this particular transaction will be denied. Now, you can go to the next one.

Mr. Deikman: All right.

Q. Previous to your appearance before the Grand Jury in Cleveland in January of 1957 did you have occasion to talk to any attorney regarding your experiences in the Communist Party?

Mr. Kelley: Object to the form of the question.

Mr. Deikman: Yes, I can see the objection is well founded.

The Court: Let's see if he talked to any attorney first. I would assume that he talked to some attorney on the occasion of every appearance with respect to what he was going to testify to before the Grand Jury or the trial.

A. I have already testified that I talked to Mr. Greenhalgh.

Q. Is that the occasion on which you talked to Mr. Greenhalgh previous to your appearance before the Grand Jury in Cleveland?

A. Yes, that's right.

Q. Where was that?

A. In Chicago.

Q. Where in Chicago?

A. It was at my hotel. Right now the name slips my mind. If you can name off a few hotels in Chicago, maybe it will bring it back to mind if it is important.

[fol. 834] Q. How many days did you talk to him in Chicago?

A. A couple of days.

Q. Do you remember testifying in the Cleveland trial that you talked to him three or four days?

Mr. Vincent: I object to that.

A. It is entirely possible. I know it was more than a day.

Q. How many hours each day did you talk to him?

Mr. Kelley: That is irrelevant.

The Court: Let him answer. I do not see the relevancy.

A. I don't remember the hours. I probably talked a total of 12 hours.

Q. Do you remember testifying in the Cleveland trial that you talked to him about six or eight hours a day and it took up most of your time at the convention?

Mr. Vincent: That is argumentative.

The Court: It is entirely possible he did. If he talked to him 40 hours, what is the point if there wasn't any statement prepared or made to come within this statute? Ask him what was done about transcribing or making a statement or something like that whether it took a week or ten minutes. That is what I am interested in.

Mr. Deikman: He testified he talked to him three or four days six or eight hours a day. He said he assumes Greenhalgh took notes.

The Court: I haven't heard him tell that.

Mr. Deikman: In the Cleveland trial. That is what I am leading up to.

The Court: Ask him if there were any notes taken.

A. I think the Cleveland testimony will record that I knew of no notes being taken. I assume that anybody talking to me, and that includes you, will make some notes on it, but I had no knowledge of my own personal knowledge.

[fol. 835] The Court: There were no notes made in your presence?

The Witness: No, sir, there was no notes made in my presence.

Q. Do you recall testifying in the Cleveland case that you think he did take notes but you aren't sure?

The Court: I do not know what he testified to or whether that is your conclusion. Read the question to him and ask him if he so testified.

Q. On page 829 of the Cleveland transcript appears the following: "Question: And do you remember whether he had taken some notes at that time? Answer: I don't remember. I think he did, but I am not sure."

A. That's correct. I assume that any lawyer will take notes, but I don't know whether they do or not. Maybe that is one of the professional secrets. I don't remember any notes that Greenhalgh ever made. I can assume he made them.

Q. What was the subject matter of your conversation with Mr. Greenhalgh?

Mr. Vincent: The Government objects to that.

The Court: I will sustain the objection unless you can show prima facie that there is something that comes within the category. It doesn't matter what the subject matter is.

Mr. Deikman: I think I will argue it now and not pursue the question any further. My argument is this, Your Honor: that prima facie it can be presumed that an attorney who talks to a witness for six or eight hours a day for three or four days has made notes.

The Court: Well, I do not think that is a sound assumption at all to start with. One of the best trial lawyers I ever knew in my life never made notes of a discussion with witnesses, and I have heard him lecture on the subject a good many times and say he thought that was the best way of proceeding. I don't know that there is any assumption to be drawn.

Mr. Deikman: On the basis of the witness's stated assumption, which is in the record—the record will bear me [fol. 836] out—that he assumes that he did take notes, that lends to my assumption, and we feel—

The Court: Let that assumption stand and assume that, where is there anything that would bring it under the rule? There is no showing here that they were ever transcribed or shown to the witness or that he ever saw them or ever accepted them or adopted them or anything else as the rule provides. Assume that he did make notes.

Mr. Deikman: Subsection (1) of Section (e) requires that the witness adopt the statement. Subsection (2) does not require that the witness adopt it.

The Court: Where is there any evidence that the attorney went back to his room that night, if that is your assumption, and wrote down notes that were a substantially

verbatim transcript of what the witness said? There is not a bit of evidence along that line.

Mr. Deikman: We contend that Mr. Greenhalgh is shown by the testimony that now exists to have taken notes as complete and substantially verbatim as, for example, Defendant's Exhibit I in it on page seven of the statements which we have been provided in regard to the witness Gardner under Section 3500. I won't press it, Your Honor. That is our position.

The Court: I do not see any merit to that for the reasons I have pointed out, so, the request for production in connection with that statement which you call a statement or this transaction preceding his appearance before the Grand Jury, no foundation has been laid to warrant any production, because it has not been shown that there is any statement made within the definition of the statute. So, the request will be denied. Do you have any others?

Mr. Deikman: Aside from the notes I would like to pursue the Greenhalgh situation in Chicago further, your Honor.

Q. Did Mr. Greenhalgh at any time as a result of his conversation with you in Chicago present anything in writing to you for your approval or for your inspection?

A. No, sir.

Q. Did you provide to Mr. Greenhalgh anything in writ-
[fol. 837] ing either printed or in longhand?

A. No, sir.

Q. Was your conversation with Mr. Greenhalgh in the form of question and answer or in the form of a narrative statement by you?

A. Both.

Q. I ask you to look at the reports or statements which have been provided to us in regard to your statements under Section 3500, and I ask you whether on the occasion of your testimony in the Cleveland trial, whether you saw any other statements by yourself in relation to your experiences in the Communist Party as to joining the Communist Party or being expelled from the Communist Party or in relation to Mine-Mill.

Mr. Kelley: Object to the question.

The Court: You need not answer that question I think for a number of reasons. The witness has testified here unequivocally, as I understand, that this statement that he referred to as dated July 16 was the only written statement he made in connection with this matter. You have asked him if he gave Mr. Greenhalgh any written statement made by himself, any writing made by himself or anything of that kind, and, so, I think the objection will be sustained if the Government objected.

Mr. Crandall: It did, your Honor. The objection was made.

Mr. Deikman: Well, your Honor, in the Cleveland trial statements were provided on the part of this witness to the defendants there which have not been given to us.

The Court: That is understandable, and I am not interested in that in the least, because, if the Court made a mistake here, it is not a matter to argue with this witness. The record is preserved on that. I think exactly that situation would attain. I can't think it would be otherwise, because, by the same token, matters that were relevant here were not given in the Cleveland trial. That is such a wide assumption I cannot see any merit to it whatever.

Mr. Deikman: That is why I asked him if it related to his experiences in the Communist Party, his membership.

The Court: He told you he furnished no paper or no statement to this man at any time regarding anything.

[fol. 838] Mr. Deikman: Statements were made, and they were provided in the Cleveland trial. I asked him if he saw those statements, and if he did—

The Court: I do not know if they were, and I do not know a thing about it. I am not trying the Cleveland case. So, we might as well drop that angle. Do you have any more questions you wish to ask him?

Q. Did you have—may I have that back, Mr. Gardner?
A. Yes.

Q. Did you have occasion late in 1956 to talk to Mr. Broome in Broome's hotel in Butte, Montana, relative to your activities in the Communist Party in 1951, 1952, 1953, and 1955?

Mr. Vincent: The Government objects to that.

The Court: I will sustain the objection. You can ask him if he had a conversation with him and develop what happened in the way of making a statement, whatever the subject.

Q. Did you have occasion to talk to Mr. Broome, an attorney for the Government, in Broome's hotel in Butte, Montana, late in 1956?

A. I did.

Q. Was that one conversation or more than one conversation?

A. Only one that I can recall.

Q. How long did that last?

A. Oh, probably, a couple of hours.

Q. Did Mr. Broome take notes?

A. No, sir, he didn't, and I asked him if he was taking notes, and he told me he was not.

Q. Was anything in writing prepared as a result of your conversation at that time and shown to you?

A. There was never anything shown to me in writing about that conversation.

Q. And your blanket statement with regard to mechanical transcriptions applies to this instance and all other instances relating to that?

A. Yes, sir.

Q. Did you have occasion to speak with Mr. Broome in June of 1957 in Washington, D.C.?

A. I did. I am not sure of that time, but it was in the warm weather in 1957. I was in Washington and spoke to Broome.

Q. And at that time was it more than one conversation?

A. I believe there was more than one.

Q. How many conversations would you estimate?

[fol. 839] A. I would estimate two or three.

Q. How long were those conversations?

A. Oh, sometimes just about a half hour, sometimes an hour.

Q. Did they relate to your experiences in the Communist Party?

Mr. Kelley: The Government objects.

The Court: You do not have to answer that question.

Q. Did they relate to the Communist Party?

Mr. Vincent: Object to that.

The Court: The point I am trying to make and seemingly without much effect is that even if he talked about the precise matter he testified to here on the stand in this case, I do not know what the situation is. Unless there was a statement made within 3500, why, the thing would not be relevant. I assume that the witness can talk to a Government attorney about a case and about his testimony and that there is no basis for production unless this was a statement made within the definition of the statute. So, let's get to what was done in the way of a statement.

Mr. Deikman: Yes, sir, we understand that is the position of the Court. I think the following—

The Court: If there was a statement made, then we will come to the question of relevancy or something.

Mr. Deikman: But it is going to be our position, and we will have despite the fact that the witness will say no statement was made at that time in writing, we are showing an accumulation of numerous conversations lasting over many, many hours in which it is incredible to suppose that no statements were made or no notes were taken, and we will argue—we recognize what your Honor's position is on this already—but we want to make the record clear that that was the situation, because there will come a time when we will argue that this is a circumstance which shows that efforts should have been made on the part of the United States Attorney to find out whether there were such statements and to represent to us that in fact no such statements are in existence, and, since the United States Attor- [fol. 840] ney made no such effort, we feel that this would be error. That is why we are trying to make this record at this time.

The Court: Proceed and make the record. That is what I am waiting for, but there is no use of getting into the subject matter phase of it until you have established there is a statement. Then we can go to the subject matter.

Q. At that time did Mr. Broome take notes?

A. No, he did not.

Q. Did you provide him with anything in writing whether printed or in longhand?

A. I did not.

Q. Did he at any time show you anything in writing that you inspected which was prepared on the basis of your conversation with him?

A. He did not.

Q. Did the subject that you were discussing with Mr. Broome at that time encompass your membership in the Communist Party, your being expelled from the Communist Party or your joining the Communist Party?

Mr. Vincent: The Government objects to that.

The Court: I will sustain the objection.

Q. Did you have occasion to in January, 1957, to talk to a Department of Justice attorney by the name of Harris?

A. Yes, I did.

Q. Was that on more than one occasion?

A. It probably was although I don't remember specifically that it was. He was the man who handled the examination before the grand jury, and I imagine it would be more than once. I just don't remember for sure.

Q. Can you estimate how many hours you talked to him?

A. Oh, when it comes to this I just have to guess. I would guess a couple of hours if guessing helps any. I don't remember.

Q. Did he take notes?

A. I don't know if he did or not.

Q. Was anything in writing based on your conversation with him shown to you?

A. No, sir.

Q. Did the subject matter of your conversation with him at that time encompass your membership in the Communist Party?

Mr. Vincent: The Government objects to that.

The Court: I will sustain the objection.

[fol. 841] Q. On the occasion of your testifying before the Grand Jury in New York City on or about December,

1956, or February, 1957, did you have occasion to talk to any attorney for the Government?

A. I did.

Q. What was—was there more than one attorney?

A. Yes, there was.

Q. How many were there?

A. Two.

Q. What were their names?

A. Mr. Greenhalgh and Mr. Harris.

Q. Where was that?

A. New York City.

Q. How many times did you talk to Mr. Greenhalgh on that occasion?

A. Oh, a couple of times. I don't remember specifically, once or twice.

Q. How many times did you talk to Mr. Harris on that occasion?

A. About the same number of times.

Q. Was that at the same time you talked to Greenhalgh?

A. Yes.

Q. Or separately.

A. No, at the same time.

Q. How long did your interviews at that time take with Mr. Greenhalgh?

A. Oh, probably, well, they were both together, so, I spent a couple of hours probably each time.

Q. Did they take notes?

A. Not to my knowledge. I don't know if they did.

Q. Did they prepare anything in writing for you to inspect?

A. They didn't show me anything.

Q. Was any stenographer present?

A. No, sir.

Q. Did the subject of conversation encompass your experiences in the Communist Party?

Mr. Vincent: We object to that, your Honor.

The Court: Sustain the objection.

Q. I believe you testified that you spoke to an attorney for the Government about a week before you testified in this case. Could you tell me who that attorney was?

A. Yes, Mr. Kelley.

Q. Where was that conversation?

A. In Mr. Kelley's office.

Q. Did you talk to any attorney over the telephone regarding this case?

A. Not that I recall. I think somebody asked me to come here to testify over the phone.

Q. Who was that?

A. I don't remember who that was.

Mr. Vincent: That is irrelevant, if the Court please.

[fol. 842] Mr. Deikman: I have a question to follow that.

The Court: That was in the record yesterday, but then—

A. I don't remember right now what his name was.

Q. How long did that conversation last?

A. About a minute.

Q. Did you talk to Mr. Kelley in his office on more than one occasion?

A. Yes, I have talked to him almost every day.

Q. For how many days?

A. For 10 days. We didn't always talk about the case, but I—

Q. Particularly in regard to the subject matter of which you testified in this case how many days did you talk to Mr. Kelley?

A. I can only remember one time when we went into this case.

Q. How long did that conversation last?

A. Oh, I guess 45 minutes, an hour.

Q. Did Mr. Kelley take notes?

A. I don't know. He could have been writing to his wife.

Mr. Kelley: Well, so the record will be clear I took notes.

Q. Did you see Mr. Kelley writing?

A. Yes, I seen him write.

Q. Was he writing during the course of talking to you about this case?

A. I think he was. I don't remember specifically, but I would guess that he was.

Mr. Kelley: If you would see how my desk is piled with stuff, you would understand that answer better.

The Court: Let him proceed with his examination.

A. I just want to make clear that people will be making notes on something else. I don't know when they are making notes unless they show them to me.

Q. Did Mr. Kelley show you his notes?

A. No, he didn't.

Q. Did Mr. Kelley provide you with anything in writing for your inspection as a result of your interview with him?

A. The only thing that was provided me was the Cleveland testimony.

Q. That was the only thing in writing?

A. Yes, sir.

[fol. 843] Q. Did you give Mr. Kelley anything in writing?

A. Well, I returned that testimony to him.

Q. That is the only thing you gave him?

A. Yes, sir.

Q. Did you—were you interviewed by Mr. Vincent?

A. No, sir.

Q. Were you interviewed by Mr. Crandall?

A. No, sir.

Q. Was any stenographer present at the time you were interviewed by Mr. Kelley?

A. No, sir.

Q. At the time that you talked to Mr. Kelley about it on other occasions during the 10 days that you say you have talked to him did you or did you not mention the subject concerning which you testified in this case?

Mr. Kelley: Mr. Deikman, it has been a week since he has been off the witness stand. You mean before he testified?

Mr. Deikman: He said he talked to you on ten occasions but only on one occasion did he talk to you about the subject matter of this case as far as he recollects. Now, I perhaps am going over the same territory, but it is so astounding that I would think it is an answer which surprises me, and I think I can go into it further.

Mr. Kelley: I should think you would separate before he testified and afterwards, because whether we talked after his testimony would not be particularly relevant to what you are getting at.

Q. Other than on occasions after you testified in this case and on the other occasions besides the one in which you say Mr. Kelley interviewed you for 45 minutes did you talk to Mr. Kelley at any other time about your subject that you testified to in this case?

A. Oh, yes.

Q. Did Mr. Kelley at any time during those other conversations take notes?

A. No, sir.

Q. Did he ever show you anything in writing on those other occasions?

A. No, sir.

Q. Was any stenographer present on those other occasions?

A. No, sir.

Q. Now, after the completion of your testimony thus far did you have any conversations with Mr. Kelley concerning the subject of your testimony?

A. Oh, I think that we probably talked about it. I don't remember anything specifically, but there was no conference as you might call it. Going out to lunch or something [fol. 844] we might have, I might have commented on something, and he might have commented. I don't recall anything specific.

Q. Did he take notes?

A. No, sir.

Q. Was a stenographer present?

A. No, sir.

Q. Did any other person take notes?

A. No, sir.

Mr. Deikman: That completes our examination.

The Court: All right. Now, is there any further examination on anything? I would like to get the evidentiary phase of this thing all settled. That is what we talked about when Mr. Witt was in here. You can conclude your argument. But let's get the evidentiary phase of it all settled.

Mr. Deikman: Let me confer with Mr. Witt for a moment.

The Court: All right. What the question was, I thought our understanding was that we would complete all evidentiary matters with this witness and any argument about the matter we could have after we get through with the courtroom.

Mr. Witt: That is my understanding, and specifically I thought we agreed that we would come back and make our motion on the grand jury testimony.

The Court: All right. Then you have no more interrogation now.

Mr. Deikman: Yes.

The Court: The Government just handed me a series of statements. I haven't examined them yet. They were referred to in the witness's testimony here made at Anchorage, Alaska. The first one here is October 4. I don't know the dates of the others. I will look these over with the idea of determining whether they are in any way relevant to the direct testimony in this case, and, if you gentlemen will give me five minutes, or I will send for you. I don't know how long it will take.

After Recess

The Court: As the record indicates, just before recess in Chambers the Government handed me a number of statements all of which bear the heading of Anchorage, Alaska, [fol. 845] dated either October 3 or October 4, I think that's correct. I think there are no other dates in here. All of them contain a signature designated as Fred Gardner.

The witness Gardner testified here in Chambers that in the fall of 1957, I am not sure about the precise date, he made several statements to an agent of the Federal Bureau of Investigation at that time, and, as I understand the Government, these are the statements that the witness referred to in his testimony you understand?

Mr. Kelley: That is my understanding, your Honor.

The Court: I have examined these statements, and there is nothing in any of them that pertains to any matter that

relates in any way whatsoever to the subject of the witness's testimony in this case on trial. Therefore, the order for production made on motion of the defendants will be denied. These statements I think should be sealed and transmitted to the Court of Appeals in the regular manner, if there is an appeal in this case.

Mr. Kelley: Of course, along with our request that all of these originals be photostated and substituted we would like—

The Court: I haven't given thought to that, and I want to give that consideration, whether the originals ought to go or whether the photostats ought to go, but anyway these ought to go to the Court of Appeals if the case ever goes to the Court of Appeals.

Mr. Kelley: All right, your Honor.

MOTION THAT ALL NOTES, MEMORANDA, ETC., TESTIFIED TO BY WITNESS GARDNER DURING INTERVIEWS WITH GOVERNMENT ATTORNEYS BE PRODUCED AND MOTION FOR PRODUCTION OF STATEMENTS RE WITNESS GARDNER AND DENIAL THEREOF

Mr. Deikman: I do not believe the record is clear on this, your Honor, so, I had better state our motion again: In regard to all memoranda and notes by United States Attorneys, so, I will state that motion: The defendant moves that all notes, memoranda or other writings testified to by the witness Gardner as having been made during the course of his interviews with attorneys for the Government including but not limited to Mr. Kelley's notes and memoranda, that these notes and memoranda be produced to the defendant under Section 3500, and, further, we move that in view of the witness's repeated testimony that he was interviewed for long periods of time of many, many [fol. 846] hours by attorneys for the Government, in view of that fact, we request an order on the part of the Court directing the United States Attorney to determine whether as a result of such interviews any notes or memoranda or statements under Section 3500 were prepared by attorneys for the Government during those times. Those are our two motions.

Mr. Kelley: The Government objects to furnishing anything encompassed by the motion, first, because there has been no foundation laid for the production to show their existence of anything that would be encompassed within 3500, and as to the notes which were taken by the United States Attorneys or Government attorneys we submit that those would come within the classification of work product, and for that reason in addition to the other reasons stated would not make them producible.

Mr. Deikman: I would like to make one statement with regard to that, and that is that I would like to get it across for the record at this point that it is our understanding that the rule of Hickman vs. Taylor is that work product may under certain circumstances be produced to the opposite party.

Mr. Kelley: I might say also for the record that we have produced one affidavit I think it was as to the witness Mason which was obtained by a Government counsel in the preparation of the proceedings before the NLRB, and because it was a notarized statement signed by the witness that is produced.

The Court: Well, I don't think the question raised by Hickman vs. Taylor, if it is relevant under this rule, it of necessity needs to be reached here, because, as I view the evidence, as I have expressed in the course of the taking of this testimony with respect to specific transactions, I think there is no evidence whatsoever to establish in any of these occasions that are covered by the testimony that there ever has been a statement made within the definition of 3500 (e) that would be producible under this section regardless of whether it was made to an attorney or an FBI agent or anything.

In other words, there is simply no showing here that at any time anything in the way of a statement as provided in 3500 was given by this witness to any Government agent on the occasions that have been covered here by the testimony that has been covered other than as already has been [fol. 847] produced by the Government, and for that reason the motions will be denied.

I do not believe, I might add, Mr. Deikman has stressed it continually, that any inference within, any statement

within the definition of 3500, any statement was made and prepared with any of the essential details that go with a statement that there could be inferred from the fact there was a lengthy conference between counsel and the witness.

MOTION THAT ALL NOTES AND MEMORANDA MADE BY ANY UNITED STATES ATTORNEY BE PRODUCED AND DENIAL THEREOF

Mr. Deikman: I would like to make in view of the Court's ruling, I would like to make another motion. The defendant moves that in the event that we are incorrect that notes and memoranda do not fall within the definition of statement under Section 3500 that under the holding and philosophy of the Jencks case taken together with the holding and philosophy of the case of Hickman vs. Taylor apart from the statute, Section 3500 we move the production of all notes and memoranda made by any United States Attorney including but not limited to notes and memoranda made by Mr. Kelley.

Mr. Kelley: We have the same objection.

The Court: I think there is nothing in those cases that I recall that would justify the production of memoranda made by counsel even to the limited extent shown here by the testimony. I know of nothing in the pronouncements in those cases that would support that view. In fact, I think the cases are to the contrary. So, that motion will be denied. Is there anything further? You are reserving the right to this grand jury business.

Mr. Witt: We will come back after open court. May I say this before we go in open court in view of Mr. Deikman's interrogation in chambers about his talks with Mr. Kelley, since he quotes here from Cleveland I intend to drop that subject and not go into that in open court, so that I am making the statement in view of our earlier discussion today in the course of which your Honor said I could go into it, but now it has become unnecessary. So, all I have is to finish off, so you will know, I think it will be helpful, to finish off the Port Colburne-Buffalo incident, a few more questions, and a few questions about his discharge from Mine-Mill which your Honor passed on this morning and said we might go into.

[fol. 848] The Court: I said you might ask him if he discussed anything since he has been in Denver. What was this about Mine-Mill?

Mr. Witt: We discussed this morning my further questioning him about his discharge by Mine-Mill and when that took place with reference to his expulsion from the Communist Party by the FBI.

In Open Court

The Court: Ladies and gentlemen of the Jury, last night when we recessed I thought as I indicated to you that we could complete this conference in Chambers so as to enable us to proceed with the trial here in the courtroom at 1:30 and asked you to return at 1:30. It has developed, as a matter of fact, that notwithstanding our beginning this morning at 9:15 and working with a short noon hour counsel and the Court have not been able even at this moment to complete the matters involved in the discussions in Chambers. We thought rather than to detain you here longer this afternoon to proceed with the completion of the cross examination of Mr. Gardner and any redirect that may be in order after which I am going to excuse you until tomorrow morning and resume with these conferences. So, at this time we will proceed with the cross examination, the further cross examination of Mr. Gardner by the defense.

Before we do that I wish to mention one other thing to you. You will recall that yesterday the Court permitted this witness to answer the question with respect to whether the Hod Carriers Union and the Mine-Mill Union were rivals in 1955 or about that time. The Court permitted the witness to answer that question. I have concluded after a consideration of the matter and after hearing the arguments of counsel that the Court was mistaken in permitting that question to be answered. So, you will disregard entirely any of the testimony of this witness relating to the question of any rivalry between the Hod Carriers and Laborers Union and the Mine-Mill Union. You will not consider that at all in your deliberations of the case, and that testimony will be stricken.

So, you may proceed, Mr. Witt, with your cross examination.

[fol. 849] FRED GARDNER, resumed the stand, and testified as follows:

Cross examination.

By Mr. Witt (Continued):

Q. Mr. Gardner, in connection with your testimony about returning from Canada to Buffalo with Travis will you tell us what you did after you crossed the bridge to New York State?

A. I believe we went to a hotel in Buffalo.

Q. Do you recall the name of the hotel?

A. No, I don't right offhand. It occurs to me it was in the vicinity of the Ford Hotel there, but I can't recall the name of it.

Q. Would it have been the Touraine Hotel that you went to?

A. That sounds like it would be it.

Q. You checked in that hotel that night?

A. I think that is what happened.

Q. Did you stay at that hotel that night?

A. I don't recall for sure whether I did or not.

Q. Well, I thought you said a moment ago you checked into that hotel.

A. We came back to that hotel.

Q. You had dinner there, didn't you?

A. I believe so.

Q. You had dinner with Travis?

A. I don't recall for sure that I did or not. It seems that I did.

Q. Do you recall anybody else that you might have had dinner with?

A. I don't offhand.

Q. About what time was it that you crossed the border into New York State?

A. Well, it was after dark.

Q. It was the fall of the year, wasn't it?

A. Yes.

Q. And it was pretty late in the evening, wasn't it?

A. Yes.

Q. About 8:00 o'clock?

A. I imagine at least that, maybe later.

Q. Was it as late as 9:00 o'clock?

A. I don't remember for sure, but I am sure it was at least 8:00.

Q. But you do recall at least you had dinner at the Touraine?

A. I don't recall exactly where I had dinner, but I certainly don't recall having it any other place.

Q. I will ask you again whether you recall checking in at the Touraine and signing the register at the Touraine that night.

A. No, I don't recall it, but I could have.

Q. Do you recall whether you drove back to Cleveland that night from Buffalo?

A. It doesn't occur to me that I did.

Q. You drove back to Cleveland the next day, didn't you? [fol. 850] A. I think so.

Q. Aside from Travis did you see anybody else connected with Mine-Mill that night?

A. I don't remember.

Q. To refresh your recollection didn't you see John Clark, the President of Mine-Mill, that night?

A. I don't remember for sure whether he was there or not.

Q. I will ask you whether you remember that Travis checked into the Touraine at the same time you did.

A. It occurs to me that he did.

Q. And he signed the register?

A. I suppose he did.

Q. Then I will ask you whether—strike that, please, Miss Marson. Did Travis and you sign the register at the Touraine at the same time?

A. I am not too sure. I just don't remember for sure what happened when we came back.

Q. Do you recall whether a third person also signed the register?

A. No, sir, I don't.

Q. Do you recall whether Jack Clark also signed the register?

A. It occurs to me that I remember seeing Jack Clark, and I can't fix him definitely at the hotel right now.

Q. But you recall seeing him that night?

A. It seems to me I did.

Q. Did you find out either that night or any other time how Jack Clark got back from Canada?

A. Yes, I believe that one of the fellows drove him back.

Q. Do you remember which one it was?

A. One of the staff members.

Q. One of the Canadian staff members?

A. Yes.

Q. Which one?

A. Oh, I don't remember. I didn't know ther names very well.

Q. Was it the Business Agent of Port Colburne Local?

A. It could have been.

Q. Well, just—

A. I don't know. I don't know who drove him back.

Q. Just to refresh your recollection, Mr. Gardner, did Clark drive with you back from Welland to Port Colburne?

A. No, sir.

Q. Who drove him back?

A. Oh, I don't know who drove him back.

Q. Where did he go from Welland—strike that, please. Where did Jack Clark go from Welland, if you know?

A. I don't know. I wasn't paying much attention to Jack Clark at the time.

Q. And you don't know what his plans were after you and Travis left from Canada when he stayed in Canada?

[fol. 851] A. I think he came back. I think he mentioned something about going to Washington or something the following day.

Q. Or going to New York, wasn't it?

A. Or to New York or Washington or some place.

Q. Are you able to fix the dates now?

A. No, sir.

Q. Now that you have slept on it?

A. No, sir.

(Document marked Defendant's Exhibit M for identification.)

Q. How many miles from Cleveland to Buffalo, Mr. Gardner?

Mr. Crandall: We object to that.

Mr. Kelley: We object to that as being irrelevant and immaterial.

The Court: I didn't hear the question.

Mr. Witt: The question is how many miles is it from Cleveland to Buffalo. This is preliminary.

The Court: I think I will let him answer on counsel's statement it is preliminary.

A. Oh, I don't know. I would say roughly 90 miles.

Q. Do you recall in connection with this trip to Canada that you drove from Cleveland to Buffalo on one day, the following day is the day that you crossed the border and went to Port Colburne and Welland and came back that night and it was the day after that that you went back to Cleveland, do you recall that?

A. I am not too sure of that and how it worked out.

Q. All right, Mr. Gardner, I will show you Defendant's Exhibit M for identification and ask you whether that is not your voucher which you submitted to Mine-Mill for the period ending October 15, 1951.

A. It could be.

Q. Well now, Mr. Gardner, is that your signature at the bottom?

A. Yes, but this doesn't, this doesn't say what trip it was.

Q. I haven't asked you that. Mr. Gardner, you just wait. You just answer the question I am asking you. I am simply asking you whether that is not your voucher.

[fol. 852] A. Well, I think it is.

Q. You know it is, don't you, with your signature?

A. It appears to be my signature, yes.

Q. Now, I direct your attention to the date of October 8, and does that state that on October 8, 1951, you went from Cleveland to Buffalo?

A. Yes.

Q. And that shows your mileage, doesn't it?

A. Yes, and—

Q. It shows that the mileage, the speedometer reading on your car when you left Cleveland was 61,130, doesn't it?

A. Yes.

Q. And your speedometer reading at the end of the trip was 61,337, doesn't it?

A. Yes.

Q. Now, in view of that, Mr. Gardner, do you want to take a minute to calculate the difference and then I will ask you whether you won't tell us again what your present recollection is as to the mileage between Cleveland and Buffalo.

Mr. Kelley: May it please the Court, that is irrelevant and collateral to any issue in the case.

Mr. Witt: No, sir, it goes to the heart of this man's testimony, and it is preliminary, your Honor. I have to ask him—

The Court: I will overrule the objection on the basis it is preliminary, but if you can compute from that what the mileage is, you can state.

A. Just roughly, I'm not too good at figures just like this to subtract, but I was wrong, because roughly the mileage is about 180 miles from the city limits to city limits.

Mr. Witt: At this point I offer this document in evidence.

The Court: For what purpose?

Mr. Witt: For the purpose of asking him further questions from it and reading from it further.

The Court: I don't think there is any basis for the introduction of it now.

Mr. Witt: All right, sir, I will ask him some more questions.

[fol. 853] The Court: All right.

Q. Now, this voucher shows for the date of October 9, the next day, that you used your car in the Buffalo area, doesn't it?

A. Yes, sir.

Q. And it shows the speedometer readings there at the beginning of that day and the end of that day, doesn't it?

A. Yes.

Q. And that is the day, isn't it, that you went to Canada?

A. Yes.

Q. And that mileage which you referred to as having been done in the Buffalo area is the mileage involved in the trip from Buffalo to Canada and back?

A. I will tell you what would happen. When I left Cleveland I would take the speedometer reading, and I would not take it until I came back and roughly fill in between. I would not necessarily take that mileage from Buffalo to Canada. I would fill it in when I came back to Cleveland to get the total mileage for that trip.

Q. In any event I will ask you whether that entry would indicate to you that it was on that date, October 9, that you went to Canada and back to Buffalo.

A. Yes, but my miles would have to indicate, my mileage from Cleveland and to the time I returned to Cleveland to get the total mileage, because I never attempted to be accurate on any shorter trips that I made. I filled them in roughly, and that was it as long as I got the actual mileage when I started and when I returned to my home base.

Q. I wasn't asking you about the mileage. I was asking you whether this voucher with the entries of that day would indicate that was the date you went to Canada.

A. Yes, it would indicate that.

Q. Now, I direct your attention to the entry for the next day, October 10, with the description under the heading transportation Buffalo to Cleveland with the speedometer readings at the beginning and at the end and ask you whether that would indicate to you that that is the date on which you returned to Cleveland from Buffalo.

A. Yes, sir, but, again, I want to point out—

Q. I am not asking you about the mileage again, Mr. Gardner.

A. Yes, sir.

Q. I am simply asking you whether that would indicate to you that that is the date on which you drove back to Cleveland from Buffalo.

A. Yes, that's right.

Q. Then I will ask you whether it was on the evening of [fol. 854] October 9 that you registered at the Touraine Hotel.

A. It could be. I don't remember the date I registered there.

Q. Well, I am asking you to tell us whether your voucher indicates in light of the answers that you gave that when you came back into New York State from Canada you registered at the Touraine, whether that would not be October 9.

A. Well, it could be. According to this it would indicate that. I, again, would have to say that in lieu of any specific bills or anything I don't know any more than what the voucher says.

Q. Now, Mr. Gardner, did the Canadian Immigration authorities ask you any questions before they passed you that day?

A. Yes, they did.

Q. Did they ask you about a brief case or brief cases you had in the car?

A. Well, I don't recall that. The only conversation I recall we told them we were going to Port Colburne for a couple of bottles of beer, and I remember—

Q. Now, Mr. Gardner, I am sorry to interrupt you. I wasn't asking you about October 8 or whenever it was when you went up. I was asking you about the day on which—I wasn't asking you about your entry into Canada. I am asking you about your return from Canada to Buffalo.

A. I—

Q. To make it clear so there won't be any confusion in your mind and in the record, Mr. Gardner, did the Canadian authorities at the border ask you any questions before they permitted you to return to the States?

A. Not that I recall. I don't remember any questions. I remember only driving up to the shanty there and getting an okay to go ahead.

Q. Don't you recall their asking you questions about the brief case you had in the front seat with you?

A. No, sir, I don't recall any questions at all.

Q. Did the American authorities ask you any questions about the brief case?

A. I don't recall any.

Q. Do you recall having a brief case in the seat of the, in the front seat of the car?

A. No.

Q. Your vintage Chevrolet was an old-fashioned coupe, was it?

A. Yes, with a rumble seat.

Q. With a rumble seat?

A. Yes.

Q. It didn't have a seat in the back in the body of the car like the modern cars?

A. That's right.

Q. You were very crowded?

A. We were going up.

Q. I am talking about on the way back from Canada, there wasn't much room in that seat where you were sitting? [fol. 855] A. Well, I imagine we were both comfortable. I don't recall any crowded condition coming back.

Q. Do you recall a crowded condition going up?

A. Yes. Yes, I do.

Q. Who was with you on the way up?

A. Jack Clark and Travis.

Q. Clark with (sic) with you on the way up?

A. That's right.

Q. And you don't remember—and you remember the crowded condition on the way up, is that right, with the three of you?

A. Yes.

Q. And did Jack Clark complain about that and kid you and Travis about it?

A. Yes, he sure did.

Q. And isn't it true that Jack Clark was in that car with you also on the way back and made the same complaints and kidded you and Travis about being so big and he didn't have enough room for himself, do you remember that?

A. No, sir, he was not with us coming back.

Q. You would not remember—strike that, please. Do you remember Jack Clark complaining about the fact that the brief case that was on the front seat or on the seat with the three of you made it very uncomfortable for him?

A. No, sir, I don't remember. I just don't remember a brief case being in the front coming back.

Q. I will ask you now, isn't it true that after you crossed the border, I will ask you again, you went directly to the Touraine Hotel, didn't you?

A. Yes.

Q. And you and Travis and Jack Clark had dinner there, didn't you?

A. I remember we had dinner. I don't remember Jack Clark specifically. I remember seeing Jack Clark at the hotel, but it is my recollection that he went there in a cab.

Q. A cab?

A. Yes.

Q. From the bridge?

A. I think so.

Q. And is it now your recollection that Jack Clark stayed at the hotel that night?

A. I am not sure of that. I remember vaguely of seeing Jack Clark around the hotel and of some conversation about his leaving the next day for I thought Washington, but it could have been New York, Philadelphia or some place else.

Q. Mr. Gardner, before you were discharged by Mine-Mill you had been removed from the staff in Butte, hadn't you?

A. Well, not that I know of.

Q. Well, Mr. Gardner, before you were discharged weren't you sent on an assignment out of Butte?

A. Well, I was sent on a very brief assignment out of Butte, yes.

[fol. 856] Q. When was that?

A. I believe it was in May or June.

Q. And what was that assignment?

A. Oh, to make some kind of a survey in the uranium industry.

Q. And you made that survey and went back to Butte?

A. Yes.

Q. Before you were sent on that survey did Al Pezzati, the Secretary-Treasurer of Mine-Mill, have a discussion with you about your status in Butte?

A. Not that I recall any conversation with Al Pezzati.

Q. Who fired you?

A. Al Pezzati.

Q. And who was present on the occasion you were fired?

A. I believe the Board member from the District.

Q. Ernie Salvas?

A. Yes. I was first called by Pezzati, he talked to me on the phone and asked me to come up to the office so he could fire me officially in the office.

Q. What was the date of that, do you remember?

A. I don't remember the exact date of it.

Q. Was Jack Clark also there?

A. I believe he was although I would not be sure of that. It occurs to me there was somebody else in the room.

Q. Isn't it true that before you were fired on that particular date whatever it was that Al Pezzati had talked to you about your work in Butte on an earlier occasion?

A. Not that I recall any discussion with him on it.

Q. Mr. Gardner, when you were on the staff in Butte what address did you put on your vouchers?

A. Whatever my address was. I don't remember specifically at which time. I lived at a couple places in Butte.

Q. I will direct your attention now to the year 1955 when you were fired.

Mr. Vincent: If your Honor please, we see no relevancy to this line of questions.

Mr. Witt: This is preliminary.

The Court: Proceed. I will overrule the objection.

Q. Isn't it true that on the vouchers you submitted in 1955 beginning with January you were in the habit of putting the Mine-Mill office address under your signature?

Mr. Kelley: May it please the Court—

[fol. 857] A. I don't know.

Mr. Kelley: —I don't see how it is relevant what might be on the vouchers. We didn't go into the vouchers on the direct examination.

Mr. Witt: That doesn't matter. I am not restricted to what—

The Court: What is the purpose?

Mr. Witt: May we approach the Bench, or I can say it in open Court, but I think Mr. Kelley would object?

(Conference at the Bench.)

In Open Court

Q. Mr. Gardner, didn't there come a time in 1955 before you were fired that instead of putting down the office address, the Mine-Mill office address on your vouchers as you had been doing you changed and filled in your home address under your signature?

Mr. Kelley: I object to that.

The Court: I will sustain the objection to that question. If counsel will come to the Bench.

(Conference at the Bench.)

In Open Court

(Document marked Defendant's Exhibit N for identification.)

Q. Mr. Gardner, I show you Defendant's Exhibit N for identification, and I will ask you to look at those and tell us whether it is not true that from January through your voucher for March 31, 1955, you used the Mine-Mill office address and beginning with your next voucher, April 15, 1955, you used your home address?

A. That's right.

Q. And do you recall now that you used your home address on all your remaining vouchers until you left Mine-Mill?

A. Yes.

[fol. 858] Mr. Witt: Mr. Kelley suggests that since I don't plan to offer these in evidence—

The Court: I don't see any purpose up to date to offer them in evidence.

Mr. Witt: No, no, your Honor. Bear with me a minute. I want to tell your Honor and the Jury what Mr. Kelley suggests. I am not offering them in evidence. Therefore, Mr. Kelley suggests that I read into the record the office address and the home address on his vouchers. Do I understand you, Mr. Kelley?

Mr. Kelley: I am suggesting, the implication was that he was giving the office as his address. It says on the voucher send check to a certain address. It is so there is no confusion about it.

Mr. Witt: Let the record show that before this voucher for April 15, 1955, on the line which says "Send Check To" the witness filled in 517 Metals Bank Building, Butte, Montana, and beginning with the voucher for April 15 he filled in on that line address 409 West Park, Butte, Montana.

Mr. Kelley: It says send to.

Mr. Witt: On the same line "Send To". I said the same line.

Q. In April through June you lived in Butte at 409 West Park, is that correct?

A. That's right.

Q. Now, Mr. Gardner, I show you this voucher of yours for June 30, 1955, and I ask you to look at that and tell us whether that is not the last voucher you submitted as an employee for Mine-Mill.

A. I don't know if it is the last one. That is about the time that I was fired.

(Document marked Defendant's Exhibit O for identification.)

Mr. Witt: This is Defendant's Exhibit O for identification, the one I was just asking the witness about.

Q. And that bears your home address on the line we have just been talking about?

A. Yes.

[fol. 859] Q. You took a vacation, didn't you, in April, 1955?

Mr. Vincent: If your Honor please, this whole line of questioning of Mr. Witt—

Mr. Witt: That is the last one I am asking regarding Pezzati.

Mr. Vincent: We still don't know preliminary to what.

The Court: I think I will overrule the objection. He says they are preliminary questions.

A. I don't remember when I took the vacation.

Q. All right, Mr. Gardner, will you now tell us if you recall why it is that in April on the line on the voucher

saying "Send Check To" you filled in your home address instead of office address as you had theretofore in '55?

A. Yes, sir. I think about that time was the discussion about my taking off for the Four Corners area to make a survey in the uranium industry, and I wanted the checks to go directly to my wife, and I continued that. It was just prior to that that I had had a discussion with the Secretary of the Communist Party who told me he was very unhappy with my work in the union there in Erie and that it might be advisable for me to look for another job.

Q. Mr. Gardner, in that little speech you made you said Erie. Is your mind back to the days when you are anxious to tell the jury you were taking orders—

A. I—

Q. Just a minute, Mr. Gardner. —when you were taking orders from the Communist Party to appear before a Senate Committee and perjure yourself?

Mr. Kelley: That is highly improper.

The Court: The jury will disregard the statements of counsel, and it will be stricken from the record.

Mr. Witt: I move that the statement of the witness about the Communist Party be stricken and that the jury also be instructed to disregard that.

The Court: The motion will be denied, and the answer will stand, because it was responsive to the question.

[fol. 860] Q. All right, now, Mr. Gardner, when did you return from your survey?

A. Why, I don't remember exactly when it was. I remember it was made during, oh, I think the early part of the year there before I was fired I know.

Q. Were you in Butte during the month of June?

A. I don't remember for sure. I think I was. I don't remember. You see I made two surveys. I went first to—

Q. Just a minute, Mr. Gardner. I haven't asked you a question. You said you didn't remember. You answer my question. Now, I show you Defendant's Exhibit O for identification, your voucher for the period ending June 30 and ask you whether that doesn't indicate that you were in Butte

from June 16 to the end of that month when you submitted that voucher.

A. Yes, sir.

Q. Now, was the Board member, Ernest Salvas, a member of the Communist Party to your knowledge in 1955?

Mr. Kelley: May it please the Court, we object to this. It has been gone into once before.

Mr. Witt: It is preliminary to finishing out this line as background leading to his being fired by Mine-Mill.

The Court: Has he been mentioned?

Mr. Witt: He has mentioned him as the Board member in Butte, the Board member for District 1.

Mr. Kelley: On cross examination his name was mentioned but nothing on direct.

The Court: I think I will overrule the objection and let him answer the question. He may answer.

A. I don't know. I assume he was. He met with the Communist Party Secretary, but he never told me he was.

Q. Did you attend Communist Party meetings?

A. No, sir, I never attended any meetings with him present.

Q. With Salvas?

A. That's right.

Q. Did you ever see him pay dues to the Communist Party?

A. No, sir.

Q. Now, there was a strike in Montana in 1954, wasn't there?

Mr. Kelley: May it please the Court, it seems to me this is collateral.

[fol. 861] Mr. Witt: It is on the same question of his discharge.

Mr. Kelley: We could go on for hours on preliminary matters.

The Court: What do you say this relates to?

Mr. Witt: This relates to his being fired. I want to show that his troubles with Salvas and other Mine-Mill people in Montana began in 1954 and culminated in his being fired. The witness has been—

The Court: What relevancy does this have to this case?

Mr. Witt: The witness is answering—is anxious to relate this to his being told by an FBI agent that he was expelled from the Communist Party, and I want to show in view of the FBI statement that we have that this man told the FBI that Morelas told him in June, 1955, that he was expelled by the Communist Party, and in that statement this man says that he was thereafter fired by Mine-Mill leaving the inference that he was fired by Mine-Mill because he was expelled from the Communist Party. I want to show that before June, 1955, this man was already working to break up Mine-Mill refusing to carry out orders of his immediate superior, Board member Ernest Salvas and refusing to work with the other organizers of Mine-Mill in Butte.

Mr. Kelley: The Government still objects. It is trying a collateral matter, your Honor.

The Court: Well, I think I will let him pursue the question. I don't see the subject—I don't see the relevancy of this particular question though, but go ahead.

Mr. Vincent: I would like to interrupt a moment, please.

Mr. Witt stated just now that the record would show that this witness testified that he was notified of his expulsion from the Communist Party by an FBI Agent. Your Honor, we submit the record will not bear out that statement of Mr. Witt.

The Court: The jury will be the judge of what the record contains, and their recollection will be the one that controls. Counsel's statements are not evidence and should not be considered as evidence.

[fol. 862] Mr. Witt: Do you remember the question, Mr. Gardner?

The Witness: No, I don't.

Q. The question is whether there was a strike by the Mine-Mill members in Montana in 1954.

A. There was.

Q. And that strike was finally settled, wasn't it?

A. A contract was signed. I hope that settled it. I don't know whether it did or not.

Q. That is what I am coming to. You were opposed to that contract, weren't you?

A. I definitely was.

Q. And you went around Butte talking to Mine-Mill members against that contract, didn't you?

A. I said it was the greatest Communist Party sell-out that I had ever seen.

Q. There was a big meeting in Butte at the Civic Auditorium, was there?

A. Yes.

Q. At which the membership voted whether to accept that contract?

A. They voted to submit it to ratification after a committee reported there was a dead end there was nothing left for them but to accept.

Q. And thereafter was there a referendum to decide whether the membership would ratify the agreement?

A. There was.

Q. And you went around opposing ratification of the agreement?

A. No, sir, I did not.

Q. You were opposed to it before the Civic Auditorium meeting, is that right?

A. I was.

Q. Did the membership ratify the agreement?

A. The membership ratified it because there was no other answer to their problem.

Q. And did thereafter—strike that, please. Thereafter did you have difficulties with Board member Salva?

A. I don't recall any difficulties with Board member Salva.

Q. You remember attending a Mine-Mill Board meeting?

A. I—

Q. Just a minute, Mr. Gardner. —in Denver?

A. I very definitely do.

Q. You drove down with Salva?

A. I did.

Q. And do you remember a staff meeting up in Butte before you left for Denver?

A. I did on my resolution to ask Travis to resign from the union because of his membership in the Communist Party.

[fol. 863] Q. And at that staff meeting—

Mr. Witt: Your Honor, I move that that part of the witness's answer where he referred to Travis and the Communist Party be stricken and the jury be cautioned to disregard it.

The Court: Well, I think I will sustain the motion. You will disregard that last statement. Proceed.

Q. Now, Mr. Gardner, at this same Board meeting did Mr. Salvas discuss with you in front of the other staff members his difficulties with you?

A. He discussed with me specifically a meeting that was held in Butte on the question of the failure of the International Union to get a resolution supporting Travis, and he discussed with me my failure at that time to support the position of the International Union on the question of Travis's continued leadership in Mine-Mill. My position was that the Communists had destroyed a once proud union and I just didn't want to see the remnants of it scattered further.

Mr. Witt: I move that that part of the witness's answer in which he referred to the Communist Party and what it had done be stricken and the jury be cautioned to disregard it.

The Court: The motion will be denied, and the answer will stand.

Q. Now, Mr. Gardner, at the Board meeting in Denver with the difficulties between you, on the one hand, and Salvas, on the other, and the staff members in Butte, on the other, were they discussed in front of the full Executive Board of the International Union of Mine, Mill and Smelter Workers?

A. Yes, they were.

Q. At that Board meeting did you and Salvas agree that you would make every effort to work together for the good of the Union?

A. I believe we did.

Q. And went back to Montana together with Salvas?

A. Yes.

The Court: Where is this matter touching on the subject you advised the Court you were going to connect with the discharge?

Mr. Witt: I am about done.

[fol. 864] Q. After you got back to Montana you had other difficulties with Salvas, didn't you?

A. I certainly continued to oppose the Communist policies in that International Union, because they were destroying the union, and he supported those policies. In that sense, yes.

Mr. Witt: I move that the witness's answer be stricken and that the witness be cautioned not to make these prejudicial, deliberately prejudicial statements and speeches and that the jury be cautioned to disregard this last speech of the witness and not to give it any attention in its deliberations.

The Court: The motion will be denied. You asked him if he had any further difficulties or something to that effect with Mr. Salvas, and he is simply reciting what it was.

Mr. Witt: We pass the witness, if the Court please. We are done with our cross examination subject to this problem in chambers.

The Court: Any redirect?

Mr. Kelley: May we have two minutes to see if there is is (sic) anything further on redirect?

The Court: Yes. I don't think we need a recess. You can confer there.

Mr. Kelley: No redirect, your Honor.

In Chambers

The Court: What is it you wish to say?

Motion to Produce Grand Jury Testimony of Gardner and Denial Thereof

Mr. Witt: At this time, your Honor, in view of the fact that your Honor denied the motion for this man's grand jury testimony that we made at the end of his direct testimony we now move that your Honor direct the production of this witness's testimony before the grand jury in this court in 1956 relating to this defendant Travis and particularly as to the two incidents the witness testified about,

one, the Canadian trip, and, two, the talk with Travis at Travis's house in Denver in June, 1953. We ask that this [fol. 865] testimony be produced directly to the defense and in the alternative that it be produced to your Honor first, and, if your Honor finds contradictions between that grand jury testimony and this man's testimony in open court, that your Honor then make that testimony, that grand jury testimony available to the defense for further cross examination.

The Court: What is the basis for the production of the grand jury records?

Mr. Witt: All right, sir. We think the case here is even stronger than we thought it was in the case of Eckert. In the first place, to brush aside one legal problem Mr. Kelley mentioned when we were discussing the witness Eckert, Mr. Kelley pointed out that that Alper case in the Second Circuit said that, if the job is a relatively simple one with limited compass, then the Court could be called upon to do it. We think that is the situation here, because the witness testified only basically about these two incidents, that is what we are talking about, without the colloquy and interruptions, objections, and all the rest of it that could have been given in five minutes probably, 10 at the most, and the same thing would be true if he testified about those two incidents before the grand jury. So, the problem is not burdensome.

As we see it, this man's testimony is incredible from the point of view of his testifying that he had not told the FBI or any Government attorney in the past about them with the possible exception of his talk with Mr. Kelley before he took the witness stand here after he came in from Cleveland. It is particularly incredible, your Honor, in view of that part of the documents furnished the defense under Section 3500 and that particular page where he talks about his stopover in Denver in June of '53 and where he reported about what Sanderson told him which he didn't testify to on direct but didn't report on what Travis told him on that occasion. We think his testimony is just as incredible on the Canadian trip.

This man has been talking to the Government, to the FBI and to Government attorneys and god knows who else

since 1955, and it is just impossible to believe especially since the record shows that he talked to the FBI before the first Travis trial in 1955, it is impossible to believe that he wasn't interrogated about Travis at that time, and it is [fol. 866] impossible to believe that he hasn't been interrogated about Travis on subsequent occasions, and it is impossible to believe that, if he is telling the truth about these episodes, he didn't tell the FBI or Government attorney or somebody representing the Department of Justice, Mr. Broome or somebody, about them.

So, we conclude either that statements under 3500 about these two episodes which should have been furnished to us and have not been without my now implying that they have been deliberately withheld, and it is impossible for us to conclude that there is grand jury testimony consistent with either of the two deductions, one, if he never talked about it before he saw Mr. Kelley here the other day, how he got before the grand jury on those episodes, whom he talked to, and, if he did, then that is also incredible in light of his testimony, and in any event we think we impeached him sufficiently on his memory and on his interest and from every other point of view to undermine his credibility especially in light of the fact that this is not a burdensome task we are entitled to get at the truth.

The Court: Have you anything to say?

Mr. Kelley: The Government objects to being required to produce the grand jury testimony of the witness Gardner given before the Colorado Grand Jury in 1956, first, because there is no foundation whatsoever that has been laid for its production, second, the testimony was given in a case which is pending in this Court in which this defendant is also a defendant and Mr. Witt is also counsel. Further, that the only basis advanced by Mr. Witt is his disbelief, and the cases that I am familiar with, Mr. Witt has produced none that indicate that disbelief by counsel is any basis for production of anything, and the cases with which the Government is familiar the courts very reluctantly lifted the veil of secrecy around grand jury proceedings, in cases of perjury where the perjury was committed before the grand jury or in cases where the testimony is necessary for the defendant to prepare his defense. Well, obviously, this is

not a case of perjury before the grand jury, and it is not necessary for the defendant's preparation for his defense.

Mr. Clark was present on part of the event, and the implication was that he was present all of the time, and he is still President of Mine-Mill and apparently still living in [fol. 867] Denver, and he is not a defendant in any case in this District or any place else as far as I know, any criminal case, so, that there is no, there is no foundation whatsoever for the production of that grand jury testimony, no reason to burden the court no matter what the extent of his reading of the testimony.

The Court: Well, I held the other day and I reiterate that I do not believe that 3500 requires the production of grand jury records per se. That was discussed the other day.

Mr. Witt: We agree with that.

The Court: And I know of no rule or statute or any decision that would warrant ordering the production of the Grand Jury records or minutes or testimony in this case. The cases in which things of that sort have been ordered come within some situation where in rare instances the courts have said the grand jury minutes should be produced, but there has been nothing in the testimony in this case that lays the foundation that would bring it within the rule of any of those cases that I am advised about, and I haven't seen any case that would justify ordering the production of these grand jury minutes or testimony. The motion will be denied.

Mr. Witt: Just one thing for the record, just to answer any implication of what Mr. Kelley said that we want this grand jury testimony as a part of discovery in connection with the Pezzati case, your Honor, that is ridiculous on the face of it, because since Gardner testified in open Court about these two incidents, it is obvious, if he takes the witness stand, if we ever go to trial in that conspiracy case, that his testimony in that case will have to be consistent with his testimony here.

The Court: That factor didn't enter into my consideration in determination of the motion. My determination would have been the same even if there hadn't been such a case around here. We will proceed at 9:30 in the morning with the examination of Mason.

Mr. Witt: That is our understanding.

Mr. Kelley: That is my understanding. May the record [fol. 868] show that Mr. Gardner is excused from further attendance?

The Court: I believe that's right, isn't that the understanding?

Mr. Witt: Yes, we have no objection.

In Chambers

Mr. Witt: Your Honor, we asked for this conference in Chambers because of a problem we ran into last evening in going over these statements with respect to the witness Mason which have been produced for the defense pursuant to Section 3500. In going over these, and I am now referring to pages nine, ten, and 11, two FBI reports, the first one dated August 10, 1953, that is page nine, the second one dated August 18, 1953, pages ten and 11, what we noticed with respect to those two reports is that Mason's name appears at the top of those at the very beginning where it is stated that William Mason orally advised or orally furnished the following information certain dates. We notice that Mason's name appears in a different type than the rest of it. There is very little question in our mind that that is so, your Honor, and I doubt the Government will dispute it.

It also appears from these two reports that Mason in the body of the reports was referred to as an "informant". Your Honor will recall that in the colloquy in Chambers I think it was yesterday, maybe it was Monday, when we were talking about Arthur Morelas when the witness Gardner referred to and I referred to him as a paid informer Mr. Vincent corrected that and said that the correct word for persons who are are (sic) acting as hired hands in the gathering of information to the FBI was "informant", so that there is very little question in light of that that at the time Mason made these—strike that—when Mason gave this information to the FBI on these two occasions in August, 1953 he came in the category of hired hand for the FBI or at least a person who was giving information to the FBI confidentially, secretly.

Now, I assume from my experience with this problem before the SACB in the case of Morelas that, if I am right in saying that Mason was an informant, he had what I understand the Bureau refers to, and I get this also from the Morelas testimony before the SACB and the reports [fol. 869] submitted by Morelas to the FBI while he was an informant, which reports were introduced by the Government in that case and copies of which were furnished to us, and every informant has a so-called code name, at least it was true in Butte. It happens that these reports of Mason were given to the FBI in Butte where Morelas's reports were given to the FBI. Therefore, we think we are entitled to the original name or the name that appears on the originals of these FBI reports at the very beginning which would be the code name for William Mason.

The Court: Well, that naturally would not be a part of his statement. Obviously, that would be something independent of any statement he made if there was a code symbol. I think that was the situation where the name has been typewritten in with a different typewriter, isn't that right?

Mr. Vincent: That's right, sir.

Mr. Crandall: That's right.

The Court: That clearly and surely and certainly was not a part of his statement that he made and was simply a designation by the agent making the report and, therefore, would not come within 3500 or any other theory that I know of.

Mr. Witt: May the record show so we know what we are talking about and the record will be clear, whether the Government took out the code name for Mason and typed in his full name "William Mason" before submitting these statements under 3500 to the Court or whether the Court decided it.

The Court: The Court decided that.

Mr. Witt: The code name wasn't part of the statement?

The Court: The Court decided the code symbol wasn't a part of the report, and, in fact, there were some other reports that were furnished in the same category. In the Eckert report there were some in the same category if my memory serves me.

Mr. Witt: May the record show that we object to that procedure on this question, and it serves to deprive us of [fol. 870] the right of cross examination.

Mr. Crandall: May I just interject here a moment? I would like to correct the record. I think Mr. Witt said that Mr. Vincent stated yesterday that an informant was a hired hand. I think that is completely contrary to the fact.

The Court: I don't know, there is no question about that. I don't know what the point is about that.

Mr. Crandall: That is merely an assumption on Mr. Witt's part.

Mr. Witt: In this connection may the record show that with respect to all these witnesses on the problem of the statements under 3500 I think the record is clear but out of an abundance of caution I say this now for the record: that it is our continuing position that 3500 is inapplicable to this case in any event, because the indictment was handed down October, 1954, and there was a first trial in November and December, 1955, before this all became effective in December, 1956.

The Court: I think my recollection is you raised that same point.

Mr. Witt: Yes.

The Court: But anyway, the record may show that your motion is denied.

Mr. Witt: I have one other point in connection with these reports by the informant, William Mason, we think we are aslo entitled to receive whether it is under 3500 or not, I do not think it is, from the Government a record of any payments made to William Mason, as I said, if any, in connection with his being an informant for the FBI. May I just say this one word on that, Your Honor? Again, in the case of Arthur Morelas before the SACB which, of course, was a civil procedure, merely an administrative proceeding where the Government itself put in the Morelas reports to the FBI during the period he served as informant we made a similar demand in order to be in a position to cross-examine Morelas, and the Government furnished the record of payments to Morelas. That is why I was able to [fol. 871] say the other day that Morelas received a total of $12,000. We think we are entitled to that from the Government.

The Court: What is the Government's position about that?

Mr. Kelley: I would think it would develop on cross examination that he did receive payments. I think it is premature at least if nothing else.

Mr. Witt: We do not think this is a matter for cross examination. Under Jencks and under other cases the prosecution knows whether Mason was paid, and we think it is an obligation of the prosecution to tell us now before we cross-examine this man. If Mr. Kelley wants to make a statement off the record—

The Court: Do you know of any authority or precedent that would warrant that?

Mr. Witt: I think we are entitled to it under Jencks. There is the precedent cited before the SACB in the case of the Attorney General vs. Mine-Mill under the Act of 1954.

Mr. Kelley: Both of the previous witnesses you have gone into that as to what they received on cross examination.

Mr. Witt: They were not witnesses as to whom we had any information whatever that they were informants especially during the period say that they were with Mine-Mill. These reports, I have referred to, these two in August, 1953, as I said, indicate clearly that Mason was an informant not only because of the different typing used in connection with his name—

The Court: What is the difference? I do not get the significance of it.

Mr. Witt: The difference is, your Honor, if a man serves as an informant for the FBI confidentially and furnishes them information and acts as a collector of information at the time, the SACB case and dozens of other cases in recent years prove conclusively that in every such case the informant is paid by the Government for his work as a stool pigeon.

[fol. 872] The Court: I do not know of any significance to that, and I know of no case that makes that distinction. You have asked these other witnesses if they were compensated, and, of course, that would probably be admissible showing possible interest or something of that sort, but I see no basis on the face of this presentation to require the Government in advance to produce anything about payments to the witness. I think you can interrogate as you have these others with respect to that. Something then

might arise that conceivably might justify it, but I don't know about that. I think we had better meet that when it comes.

In Open Court

WILLIAM MASON, resumed the stand, testified:

Cross examination.

By Mr. Witt:

Q. Mr. Mason, you have given testimony about Travis and Mine-Mill on other occasions before you took the witness stand in this trial, haven't you?

A. Yes.

Q. Will you give us all those occasions to the best of your recollection?

A. I testified at the trial of Travis.

Q. You mean at the first trial in this case?

A. Two years ago I believe.

Q. When was that more exactly if you remember, what month and what year?

A. It was late in 1955.

Q. All right, sir. Any other proceedings in which you have testified about Travis or Mine-Mill?

A. I don't recall any other testimony on Travis.

Q. Well, didn't you testify before the NLRB in the so-called decompliance case?

A. Yes.

Q. And didn't you give testimony there about Travis?

A. Not particularly. I testified there on the Mine, Mill & Smelter Workers.

Q. Well, didn't you give testimony in that proceeding about some conversations with Travis?

A. Yes, there was some testimony I recall now on Travis also.

Q. And that testimony related to some of the same conversations about which you testified in this trial on direct examination, didn't it?

A. Yes.

Q. And you testified about those conversations or some [fol. 873] of them the same as you testified on this trial when you testified on the first trial in this court against Travis, didn't you?

A. I am sorry, I didn't get the question.

Mr. Witt: Well, it is a little complicated.

Q. When you said you testified against Travis in this court in late 1955, you said that a few minutes ago, right?

A. Yes.

Q. When you gave your testimony on that occasion did you give testimony about the conversations or some of the conversations that you have given on the witness stand in this trial?

A. Yes, some of the testimony.

Q. Also, before the NLRB aside from Travis you gave other testimony about Mine-Mill, didn't you?

A. Yes.

Q. Now, have you testified before any grand juries about Travis or Mine-Mill?

Mr. Vincent: If your Honor please, the Government objects to that.

The Court: I will sustain the objection.

Q. Mr. Mason, have you given testimony before a grand jury in this court about any of these conversations with Travis that you testified on direct examination here last week?

Mr. Kelley: Same objection.

The Court: The objection will be sustained.

Mr. Witt: May we approach the Bench, your Honor?

The Court: If you have anything, you can approach the Bench, yes.

(Conference at the Bench.)

In Open Court

Q. Mr. Mason, have you given testimony before any grand jury on any subject—

[fol. 874] Mr. Kelley: May it please the Court, that is subject to the same obligation.

The Court: I will sustain the objection.

Mr. Kelley: There is no relevancy apparent.

The Court: If you have any grand jury session in mind, you can ask him if he testified before the grand jury without reference to the subject matter.

Mr. Witt: I said any subject matter.

The Court: You said any grand jury. The objection will be sustained.

Mr. Witt: I wasn't going into the subject matter, but I will try it the other way.

Q. Mr. Mason, have you given any testimony before any grand jury?

The Court: You need not answer the question. The objection will be sustained. That covers all times and all occasions. That would not have any relevancy unless there is something that connects it with this matter here.

Q. Mr. Mason, have you testified before—strike that. Do you know when it was that you testified before the NLRB?

A. Yes, it was sometime in 1954.

Q. Do you remember the month?

A. No. It would be towards the middle of the year.

Mr. Witt: May I talk to Mr. Kelley a moment and see if we can't get a stipulation?

The Court: Yes.

Mr. Witt: Based on my off-the-record conversation with Mr. Kelley I propose a stipulation that Mr. Mason testified before the NLRB in the so-called decompliance case in May of 1954.

The Court: Is that right, Mr. Kelley?

[fol. 875] Mr. Kelley: That appears to be right, your Honor. It has a stamp on here.

The Court: The witness said it was sometime in the middle of the year. I don't get the significance of it.

Mr. Kelley: I don't know why we are stipulating particularly.

The Court: What is the point, Mr. Witt? The witness has fixed the time of the year he testified.

Mr. Witt: I am intending to use the transcripts. It is just so the witness won't dispute it. I am not impeach-

ing him as to the date. I want to get the testimony clear so your Honor can follow it and so the jurors can follow it so we don't get into these delaying hasties (sic) when we get to using this testimony in our effort to impeach the witness later.

The Court: Well, if it has any significance, do you stipulate that he testified on that date?

Mr. Kelley: Well, I will stipulate it was during the month of May, yes.

Mr. Witt: Nineteen fifty-four?

Mr. Kelley: Nineteen fifty-four.

Q. Now, at any time since the month of May, 1954, Mr. Mason, have you testified before any grand jury?

Mr. Kelley: I object to it for the same reason.

The Court: I think I will sustain the objection.

Q. Mr. Mason, did you testify before a grand jury in this court in 1954?

A. Yes.

Q. Mr. Mason, did you testify before a grand jury in this court in 1956?

A. I don't understand the question as it relates to "court".

Q. In this courthouse, in this building.

A. Yes.

Q. Mr. Mason, on these occasions when you testified, I [fol. 876] am referring to all of them, the two Travis trials in this court and the two grand juries and your appearance before the NLRB in May, 1954, were you paid a per-diem and a witness fee?

A. I think I was paid a witness fee.

Q. And were you paid a per-diem?

The Court: What do you mean by that?

Mr. Witt: I am sorry, your Honor. I intended to say mileage and a witness fee.

Q. I am asking you now, Mr. Mason, whether you received mileage and witness fees in connection with these appearances as a witness.

A. Yes.

Q. And in connection with any of these appearances did you receive so-called expert witness fee?

A. No.

Q. Mr. Mason, you testified last week on direct examination that at one period you knew Travis as an Acting Board member for District 7, do you remember that?

A. Yes.

Q. Do you remember—strike that. You were elected Board member in 1945, weren't you?

A. Nineteen forty-four.

Q. You took office in 1945?

A. Yes.

Q. Do you recall whether Travis—strike that, I am sorry. Did you attend the Executive Board meeting of Mine-Mill in February, 1946, in Chicago?

Mr. Crandall: I object, your Honor. That is beyond the direct examination.

The Court: What is the situation, Mr. Witt?

Mr. Witt: He testified on direct that Travis was Acting Board member. Now, I am simply trying to fix the time, if the witness remembers, when Travis was Acting Board member.

The Court: Why don't you ask him that? I do not see the significance of this meeting. If the fact is—

Mr. Witt: It is just preliminary. I will do it the other way. There are a dozen different ways of doing it. It doesn't matter.

Q. Mr. Mason, you recall the period when Travis was Acting Board member for District 7?

[fol. 877] A. I testified, and I think at this time that it was the latter part of '45.

Q. And until when if you recall?

A. I can't recall.

Q. You don't recall until when?

A. It was a brief period of time.

Q. Then, I will ask you whether you attended the Executive Board meeting of Mine-Mill in Chicago in February, 1946.

Mr. Crandall: I will object. I don't see any relevancy.

The Court: I think I will let him answer if he can recall.

A. I can't recall. I have not missed very many Board meetings.

Mr. Witt: Would you read that answer, Miss Marson?

(The reporter read the last answer.)

Mr. Witt: This has already been marked, if the Court please, through the testimony of another witness.

Q. Mr. Mason, I will ask you to look at Defendant's Exhibit C for identification and ask you whether you know what that document is.

A. Yes.

Q. Will you tell us what it is?

A. Those are the minutes of an Executive Board meeting.

Q. I will direct—in February of 1946 in Chicago?

A. That is the date on the minutes.

Q. I direct your attention to the list of names of people indicated to be present at the top of the first page and ask you whether that refreshes your recollection that you attended that Board meeting?

A. Of course.

Q. What?

A. Of course.

Q. Now, I will ask you whether you remember whether Travis attended that Board meeting as an acting Board member of District 7.

Mr. Kelley: May it please the Court, he is asking him to use that to in effect testify from it, and it is not in evidence.

Mr. Witt: I should have asked him to give it back to me.

Q. I will ask you from your recollection now that you [fol. 878] recollect attending that Board meeting whether Travis attended that Board meeting as Acting Board member for District 7.

A. I don't recollect, but his name appears on the minutes. It would seem that he did attend.

Q. Do you—strike that, please. Who had been elected Board member for District 7 at that time?

Mr. Crandall: I object, your Honor. I do not think that is within the scope—

The Court: The relevancy doesn't appear from the question. What is the relevancy, Mr. Witt?

Mr. Witt: Well, may I approach the Bench on it? I do not think we should have this discussion in the hearing of the witness.

The Court: The record isn't intelligible unless we have this.

Mr. Witt: We should get it in the record. It is difficult to get these things in the record and have the Bench conferences outside of the hearing of the Jury and the witness. I haven't wanted to make the suggestion before, because the trial has been badly disrupted already.

The Court: What is the relevancy of who was the Board member in District 7 at this time?

Mr. Witt: I object to stating in the hearing of the witness and the Jury what I am trying to show by this. I do not think it is fair to the defense.

The Court: You can pass it now, and, if it is necessary to be taken up outside of the presence of the Jury and the witness, you can take it up at the first recess.

Q. Mr. Mason, you testified on direct examination that in 1947 after Taft-Hartley became effective Mine-Mill decided not to comply. I will ask you whether you at that time as a Board member supported that position.

A. Yes, I did.

Q. I think you testified on direct examination that Mine-Mill did not comply in 1948. I will ask you whether you supported the policy of noncompliance in 1948.

[fol. 879] A. I went along with the policy.

Q. I will ask you whether you voted for that policy as a member of the Executive Board?

A. Yes, I believe I did.

Q. You testified that in 1949 Mine-Mill decided to comply. I will ask you whether you supported the policy of compliance in 1949.

A. Yes, I did.

Q. Mr. Mason, at any time since 1953 have you furnished information to the FBI about Travis?

A. Yes.

Q. On any, on one occasion or on more than one occasion?

A. On one occasion.

Q. When was that if you recall?

A. I believe it was sometime in 1953.

Q. Do you remember the month?

A. No, I don't.

Q. On that occasion did you give the FBI something in writing that you had prepared?

A. No.

Q. On that occasion did you talk to an FBI Agent or FBI Agents?

A. Yes.

Q. And you gave them information about Travis?

A. Yes.

Q. Well, Mr. Mason, don't you recall furnishing information to two agents of the FBI in Butte on June 7, 1955?

A. I don't recall the instance, no.

(Document marked Defendant's Exhibit P for identification.)

Mr. Witt: If your Honor please, if I recall the procedure we agreed upon, I now want to offer into evidence and read into the record so that the witness can hear it the part of Defendant's Exhibit P for identification beginning at the bottom of our page 34, I am sorry, beginning at the bottom of our page 35 and running to the top of page 36 being one paragraph.

The Court: What is the Government's position?

Mr. Kelley: Did you offer it in evidence?

Mr. Witt: Yes.

The Court: He wants to offer it in evidence and read it. He wants to read it into evidence.

Mr. Kelley: Well, the Government objects to it for the reason that the exhibit appears to be a report of an FBI [fol. 880] Agent which is not substantially verbatim, and there is no showing that it has been adopted or approved by the witness as his own statement, and it is not contemporaneously reported. The interview apparently in which the agent obtained some information from the witness appears to have been on June 7, and the date when the report was made was June 21 which would be two weeks later. So, it was not contemporaneously made, and, therefore, this is not a statement of the witness under Section 3500,

and we, therefore, object to its being introduced in evidence or used on cross examination.

The Court: I do not believe that is a valid reason on the basis I have indicated a number of times in ruling on this, but I question whether the matter should be received in evidence at this time without further interrogation of the witness and giving him an opportunity to refresh his recollection. He has answered that he doesn't recall talking to them in 1955. He hasn't said that he didn't, and it would not be contradictory. I think, if Mr. Witt wishes to show the witness what he has in mind and ask him if that refreshes his recollection and ask him if he did have the meeting and recall making that statement, I think that would be the proper way to proceed.

Mr. Witt: I have tried to proceed that way unless I am sadly mistaken, and your Honor suggested this other procedure. I will follow any procedure at any time.

The Court: I do not recall that I suggested that procedure except as to the method of putting it in evidence when it was admissible in evidence.

Mr. Witt: Your Honor may be right. Just one correction I may suggest in Mr. Kelley's statement about this matter. He referred to the fact that this information was furnished by the witness to an agent on June 7, 1955.

The Court: Let's not get into a dispute.

Mr. Witt: I just—I think the record will be confused, a very minor point, but I think we should be more exact than Mr. Kelley is, this shows that Mr. Mason talked to two agents on June 7, 1955. That is all. Mr. Kelley said "agent", and the word should be "agents".

[fol. 881] The Court: You may show that to Mr. Mason and ask him if that refreshes his recollection and if he did make that statement.

Mr. Witt: All right.

Q. Mr. Mason, I show you Defendant's Exhibit P for identification and ask you to read as much of the first and second pages as you want to, and then I direct your attention to the bottom of page six of the statement.

Mr. Witt: Your Honor and Mr. Kelley, so the record won't be confused, that is page 35 of our arbitrary system of numbering.

The Court: All right.

Q. This paragraph beginning at page six of the report and which paragraph is continued at the top of page seven of the report, and I ask you if that doesn't refresh your recollection that on June 7, 1955, you talked to Special Agents W. E. Kreitner, Jr., and Thomas H. Zoller, in Butte, Montana.

The Court: Is there a question pending?

Mr. Witt: Yes.

The Court: What was it?

Mr. Witt: The question was, I tried to pursue the suggestion made by your Honor and ask him if that refreshes his recollection if in June, 1955, he made that statement contained in that paragraph.

The Court: I think the first thing is, he made the statement. I mean, if he recalls the occasion, and then you can ask him if he didn't say so and so at that time. I think there is a double question in what you are asking.

Mr. Witt: Anything your Honor suggests. I want to get it over as soon as possible without these difficult delays in my cross examination.

Q. Mr. Mason, does that refresh your recollection that on [fol. 882] that date that you talked to those two agents in Butte?

A. What is that date again?

Q. You were just looking at it. I will ask you to look at it.

The Court: You can ask him the date.

Mr. Witt: All right. I will have to look at it again myself.

Q. On June 7, 1955.

A. I don't recall much of this meeting, but from reading through that I certainly did meet with two representatives of the FBI, and I can remember at least some of the statements contained there in that.

Mr. Witt: Will your Honor be kind enough to direct the witness to keep his voice up a little?

The Witness: I am sorry.

The Court: Will you raise your voice a little bit, sir?

Q. Now, I am directing your attention, Mr. Mason, again to that paragraph beginning on page six of that report and which is concluded on page seven. If you haven't had a chance to look at it sufficiently, will you look at it again and see whether it refreshes your recollection that you gave those two agents the information contained in that paragraph?

A. Yes, I believe in substance I remember the statement I made to the FBI.

Mr. Witt: At this time, your Honor, I offer that paragraph in evidence.

The Court: Does the Government have any objection other than the one they mentioned a moment ago?

Mr. Kelley: We would object to just that portion being taken out of context. We would have no objection to the full report going in, but that part taken out of context is meaningless. It takes the whole report to give any meaning to it and understanding. So, we object to it for that reason.

The Court: That will be a problem for redirect examina-[fol. 883] tion. If you have no objection other than you stated, the portion indicated may be read in evidence.

Mr. Crandall: If it please the Court, I would like to ask Mr. Witt the purpose for which he is offering this. Is it to impeach the witness concerning information given against Mr. Travis or against Mine-Mill?

Mr. Witt: Mr. Travis.

Mr. Crandall: Well, I do not think that he has laid a proper foundation in offering this, because I do not think that there is any evidence here yet to show that this report relates to Mr. Travis or whether that the witness actually gave the information concerning Mine-Mill.

Mr. Witt: I do not know what Mr. Crandall is trying to say.

The Court: Let me see the report.

Mr. Witt: Mr. Kelley has been meeting it, and that relates to Mr. Travis.

Mr. Crandall: I think actually, if you will observe the report, that the report pertains to Mine-Mill more than it does to Mr. Travis.

The Court: What is the part that you propose?

Mr. Kelley: The part he proposes is on six and seven.

The Court: It is this bottom paragraph on 35 and the top of 36?

Mr. Kelley: Yes, your Honor.

The Court: Mr. Witt, what you propose to read is the bottom paragraph on 35 and down to the end of the same paragraph on 36?

Mr. Witt: Yes, sir.

The Court: All right, I think the objection will be over-[fol. 884] ruled, and you may read that in evidence.

(Defendant's Exhibit P for identification received in evidence.)

Mr. Witt: "Mason advised that from the time of the 1946 IUMM & SW elections, Travis and he became more intimately acquainted. In all conversations, Travis, probably out of respect to Mason's knowledge of the Union, and the Party and its program, always spoke freely about his being a Party leader, about Party forces in the Union, and the Party program in general. Mason states he is unable to enlarge on this information as to dates, places or specific individuals or incidents."

Q. Now, Mr. Mason, I understood you to testify a little while ago in answer to one of my questions that there was only one occasion that you recalled on which you gave information to the FBI and that was sometime in 1953. Now, I don't know whether you want to look at this—

The Court: I do not know whether that is an accurate statement or not.

Mr. Witt: The record will show.

The Court: I know you asked him if he had given any information in '53, and he fixed that, but I don't know that he said that was exclusive—

Mr. Witt: That is my recollection, your Honor. The prosecution is sitting at that table, and I think it is the responsibility of the prosecution, your Honor, to correct me if I am wrong. I do not want to be wrong. I am making every effort to be right despite these constant interruptions and this apparent deliberate effort to discon-

cert my cross examination and to confuse the Jury about what is going on. In this connection, your Honor, I ask that no more than two of the Government lawyers speak on any particular issue since the defendant has only two lawyers, and I am afraid the way this is going that we will be hearing from all three prosecutors on these problems before we are through.

The Court: I think normally one can make the objection, [fol. 885] and then they can confer among themselves and decide. If there is any argument, then we can consider that at the time. But I think probably one had better make the objections.

Mr. Kelley: Yes, your Honor, and in regard to what Mr. Witt was just saying about his recapitulation of what the witness had testified to I think he was very vague in his questions in regard to the reports that the witness made to the FBI, it wasn't clear to me whether he was talking about 1953—

Mr. Witt: I object to this in the hearing of the witness. I object to Mr. Kelley arguing to the Jury this way, and the way to solve this, if the Court please, without any of these problems is to go back to the record and see what the witness said. Furthermore, if any of my questions are vague, Mr. Kelley is here representing the Government, and he can always object if he thinks the questions are vague. He has made no such objections, and neither has the witness.

Mr. Kelley: I am making them now.

The Court: I think you may proceed with the question, restate your question. You obviously in your question, the way you stated it, it stated an assumption of what you understood he testified to. If you wish to ask him specifically, you may do so.

Mr. Witt: I want to ask him the question I put to him. If there is any doubt about it on Mr. Kelley's part or on your part, then I must insist that we go back to the record and see what the witness testified to. It is extremely difficult to conduct cross examination under these conditions, and I insist that we know exactly what we are talking about at all times. I do not want to guess, I do not want to waste my time and energy, if the Court please, repeating

all this, because I do have the feeling that there is a deliberate interference with our right of cross examination, and—

The Court: The objection to the question in the form it is propounded will be sustained. The Court was simply trying to keep the record so that there would not be any misunderstanding, and the matters the Court mentioned were intended to be helpful to you, Mr. Witt, and with no other purpose whatsoever, and to be sure that the question [fol. 886] asked the witness was in proper form which is the Court's duty here. Now, you may proceed to interrogate the witness, and the objection to this particular question will be sustained.

Mr. Witt: Your Honor, I am sorry, of course I didn't imply any improper attitude on the part of the Court, but in view of this colloquy it could be I am wrong. I do not want to have my energy and my time exhausted and the time of the Jury taken with these problems, and the easiest way to clear it up before your Honor rules is to go back to the record. If we had done that, your Honor, we would have saved five minutes already, and it would all be clear. I don't think your Honor should rule on it, I ask you to reconsider, until we go back to the record and see what this man testified to.

The Court: Well, I do not see any basis for it, because you summarized what you thought the testimony was, and you can ask him, you can ask him right now when or on what occasions or anything else he talked to the FBI. You have a perfect right to interrogate with respect to the details. So, I think you may proceed on that basis.

Mr. Witt: All right, sir.

Q. Mr. Mason, I will ask you to answer the question just suggested by the Court if I followed it. Can you tell us on what occasions since you first became an Executive Board member of Mine-Mill, or, rather, since you became an Executive Board member of Mine-Mill in 1944 that you furnished information to the FBI about Travis.

A. I testified earlier this morning that—

Q. Mr. Mason—

Mr. Witt: Now, if the Court please, in view of the colloquy I didn't ask him what he testified to this morning.

The Court: You can answer the question, Mr. Mason. If you wish it read again, it can be read to you.

A. Well, I repeat to the best of my recollection I testified or, rather, I gave the FBI information on Travis on one occasion. I did not prepare it. It was prepared—

[fol. 887] Q. I didn't ask you that, Mr. Mason.

A. The other—

Mr. Kelley: Let him finish the answer. You are giving all the directions around here. Let's show some courtesy to the witness.

Mr. Witt: Let's put it to the Court.

The Court: He is entitled to answer the question. If there is any question about it, you can read the question. You might read the question to Mr. Mason.

Mr. Witt: The only reason I interrupted it seemed obvious to me Mr. Mason was going to another subject about which I didn't ask him. If there is any question about it, let's go back to the question.

The Court: Read the original question, and, Mr. Mason, you can direct your answer to that question.

(The reporter read the question, as follows: "Mr. Mason, I will ask you to answer the question just suggested by the Court if I followed it. Can you tell us on what occasions since you first became an Executive Board member of Mine-Mill, or, rather, since you became an Executive Board member of Mine-Mill in 1944 that you furnished information to the FBI about Travis.")

A. I didn't complete the answer if I recall.

Q. Will you start again, Mr. Mason?

The Court: Go ahead and reanswer the question.

A. I recall giving information to the FBI on Travis in 1953. I did not prepare the information.

Mr. Witt: I object to that again.

The Court: He asked you when you gave the information. He didn't ask you about a statement.

A. I am sorry. I recall being asked by the FBI in another meeting if I would testify against Travis.

[fol. 888] Q. I didn't ask you that, Mr. Mason. I simply asked you to the best of your recollection to tell us the occasions since 1944 when you furnished information to the FBI. Now, aside from the one occasion in '53 do you recall any other occasions on which you furnished information to the FBI?

A. Information on what?

Q. On Travis.

A. I don't recall any other time.

The Court: I guess your assumption is right, Mr. Witt.

Mr. Witt: Thank you, your Honor. I appreciate that, your Honor. I wasn't absolutely sure. That is why I suggested we look at the record.

Q. All right, now, Mr. Mason, I show you Defendant's Exhibit P for identification and ask you to look at the first two pages of that report, again for clarification of the record which happen to be our pages 32 and 33, and ask you if those pages don't refresh your recollection that you furnished information about Travis to the two agents in June of 1955.

Mr. Kelley: I think he has already testified to that.

The Court: I think he has testified to that, Mr. Witt.

Mr. Witt: It could be. I am confused.

The Court: I do not want to confuse you further, but isn't that the meeting that he just admitted this evidence about?

Mr. Witt: Assuming that he did, I thought to get the continuity, again, to avoid a long colloquy, I think it will take a moment to get an answer. I think your Honor must be right, because otherwise, I could not have read that paragraph into the record. So, we are even.

Q. Now, Mr. Mason, going back to your testimony before the NLRB in May, 1954, you testified this morning from the witness stand in that proceeding you gave testimony about some of these conversations that you had with Travis. In that testimony before the NLRB did you make an effort to fix the dates and the places of these conversations?

[fol. 889] Mr. Kelley: May it please the Court, that is improper type of cross examination.

The Court: I think I will sustain the objection on this basis: that you can ask him specifically if he made such and such a statement in that period. This way it taxes his memory on two things, whether he testified to it, and whether he fixed the date.

Mr. Witt: Could I just make this statement? I thought I would try it the other way. It will take us a half hour to go through that repetitious testimony before the NLRB. There is no question in my mind, since I cross-examined Mr. Mason on that occasion, since I cross-examined him again about that testimony before the NLRB, when he testified in the first trial, and there is no question about Mr. Mason's answers, and Mr. Kelley knows it having been the prosecutor in the first trial.

The Court: The point I am making is that when you make a question in that form, when he testified in a hearing and fixed a certain date, he may be able to fix the date in his mind but not recall that he testified at the hearing. That is the only vice of it.

Mr. Witt: All right.

Q. When you testified before the NLRB you testified about a conversation with Travis about his proposed resignation from the Communist Party, do you remember that?

Mr. Kelley: May it please the Court, it is the same objection, the same procedure he was following.

Mr. Witt: I thought that was the Court's suggestion. I am trying to get the date out of him without ploughing through here.

The Court: I think I will let him answer the general question if he can recall, and then it will have to be something specific, if he recalls testifying as to the subject.

Q. Answer the question.

A. I recall testifying as to the subject.

[fol. 890] Q. In that testimony did you fix the place where that conversation with Travis took place?

A. Yes, I think I did.

Q. And you fixed the time of the conversation in your testimony before the NLRB, is that right?

Mr. Kelley: May it please the Court, he is doing just exactly what the Court suggested was not the proper procedure.

Mr. Witt: The Court agrees I don't have to impeach him. There is no question about this. I am not trying to impeach him in connection with his NLRB testimony. I want to get back to the statement he gave to the FBI in June of 1955, a year after he testified before the NLRB, and the record now shows that a year after he testified before the NLRB he said he was unable to fix dates and places about those things about Travis, and I am showing now that 13 months before he said that—

The Court: I think he is entitled to have the specific testimony on this date. You can simply ask him—I know you are trying to save time—but I think you should ask him if he didn't fix the date as being such and such a date and then refer to the place in the hearing, because, if the witness should recall a different date, I expect we would have some claimed contradiction, so, you should refer to the date he gave in the testimony. I know you are trying to save time, but I think we had better do it that way.

Mr. Witt: All right, sir. Would your Honor give me a moment, because I didn't expect we would have this problem?

The Court: Yes.

Mr. Witt: May I say this, your Honor, I represent and I think Mr. Kelley is familiar with that, that testimony about this particular conversation covered many, many pages, so, I am just taking one at random from one of these volumes, and I think we will dispose of the problem.

The Court: What we are aiming at is the date.

Mr. Witt: Yes, of the conversation and the place.

The Court: You can find one of those places, read him [fol. 891] the question and ask him if that was his testimony, the question and answer.

Mr. Witt: We have agreed that this kind of material doesn't have to be marked for identification.

The Court: Yes.

Mr. Witt: Your Honor, this one I happened to find at random and happens to be from my cross examination of Mr. Mason about that occasion, but it will make the point just as easily. Otherwise, I would have to spend a few minutes trying to find his testimony on direct.

Q. Mr. Mason, first, let me ask you this: You remember when you testified before the NLRB I cross-examined you about that particular conversation with Travis about his resignation, didn't I?

A. Yes.

Q. I asked you a good many questions about that, didn't I?

A. I don't recall all the questions.

Q. Now, Mr. Mason, you remember my asking you the following question and your giving the following answer: "Mr. Witness, coming back to your testimony about your discussion or discussions with Brother Travis in Chicago in the month of July, 1949, I will ask you just once more now that you have slept on it whether there is anything you want to add to that testimony or anything you want to change about that testimony. Answer: I do not at this time wish to change anything in the testimony." Do you recall that question and that answer?

The Court: I don't see the point to that.

Mr. Kelley: That is wholly irrelevant.

Mr. Witt: I said at random. Let me ask him one or two further questions.

The Court: I thought you were trying to fix the date that he fixed in the NLRB hearing as being the date of the conversation he had with Mr. Travis about this resignation.

Mr. Witt: Yes, but I want to remind him first that he testified on direct about it, that is what my question in the NLRB case refers to, and I will ask one or two other [fol. 892] questions and we will get this out of the way.

The Court: Find the place, and, if it takes a little time, we will suspend, or where he fixes the date of this conversation we are talking about.

Mr. Witt: All right. May I sit down while I look for this?

The Court: Yes.

Mr. Witt: I am again going to try to make this shorter. Otherwise, we will have to read page after page. I am sure if the witness is permitted to answer, there will be no problem about it.

Q. Mr. Mason, I direct your attention to page 134 of the transcript of your testimony before the NLRB. I will ask you to read that question by Mr. Foley I am pointing to: "Did Mr. Travis discuss this statement with you," and your answer at the bottom of the page and see whether that doesn't refresh your recollection that you gave testimony before the NLRB about the occasion on which Mr. Travis showed you his proposed statement about his resignation which appeared in the Union paper in August of 1949.

Mr. Kelley: May it please the court, the Government objects to this for the reason that this statement is consistent with his testimony on direct, and the only purpose that I can see is that Mr. Witt is trying to show that this is inconsistent with the condensed statement of an FBI Agent in his report, and it is improper cross examination.

Mr. Witt: I now have two purposes in view of the fact that we have gotten back into the problem this way. May I know what Mr. Kelley is showing your Honor? I think if Mr. Kelley is approaching the Bench, he should advise counsel for the defense. Well, your Honor, I do not think that will give you the picture as Mr. Kelley I think knows.

The Court: Well, I don't know what—I guess this is what Mr. Kelley thinks you asked Mr. Mason to read.

Mr. Witt: Yes. May I make this statement: In view of [fol. 893] the way this has now developed somewhat to my surprise I have two purposes in mind. Shall I say this in front of the Jury? If Mr. Kelley has no objection, then, I will go ahead. I have two purposes in mind: One, to show that even though in 1955 he told the FBI he had this difficulty about fixing the dates and the places of these conversations with Travis that the year before he testified under oath giving dates and places. That is purpose number one. Purpose number two, which has not yet appeared but I am very happy to state it so that Mr. Kelley at least will know, in giving that particular testimony before the NLRB Mr. Mason was mistaken, and he later told the FBI

in one of the statements we have that he was mistaken in that testimony. When he appeared on the witness stand in the first trial in this court against Travis he conceded he was mistaken, and in direct examination on this trial the witness said that that occasion took place in Denver in July of '49 after the executive board meeting that same month in Chicago.

Before the NLRB Mr. Mason testified that that testimony about Mr. Travis's resignation from the Communist Party took place at the Executive Board meeting. This is the second purpose.

The Court: Laying aside this latter, the second part of the objection, that is not in the record at the moment. Going to the first part of the objection, aren't all the matters you mentioned in evidence already?

Mr. Witt: I have spent several minutes trying to get this. What I am trying to get is whether when he testified before the NLRB about that occasion if he did not fix the place and date. That is all I am seeking to achieve.

The Court: All I have been asking you to do is to find something in that that fixed the date.

Mr. Witt: I found that. I will find another place if Mr. Kelley isn't satisfied.

The Court: I do not find where any date is fixed.

Mr. Witt: It refers to July, '49.

The Court: He has already testified on direct examina-
[fol. 894] tion that he testified about this subject before the National Labor Relations Board.

Mr. Witt: All I want to do is to fix, to get it from the witness, and I am sure the witness will agree with me that I don't have to show him any part of this transcript before the NLRB for him to say that when he testified before the NLRB he said this conversation took place in Chicago in July, 1949, during the course of the Executive Board meeting.

The Court: Ask him that, and I think that will simplify it.

Q. Answer the question.

A. What is the question?

Q. The question is whether when you testified before the NLRB about your talk with Travis about his proposed resignation from the Communist Party, the conversation in the course of which you said he had talked to Ben Gold and the boys or something like that in New York, the same conversation you testified about on direct examination here last week, whether when you testified before the NLRB, I am asking you if you didn't testify that that conversation took place in Chicago during the course of the Executive Board meeting in July of 1949.

A. Yes, I did.

After Recess

The Court: Ladies and gentlemen, you will recall that we had a little discussion here just before recess about the number of lawyers that might properly object to the testimony on each side, and the Court indicated that he thought probably it should be limited to one. Counsel advise me they have agreed that two on either side may object. That's correct, isn't it, gentlemen?

Mr. Kelley: Yes, your Honor.

Mr. Witt: Yes, your Honor. Thank you, your Honor.

William Mason, resumed the stand and testified as follows:

Cross examination.

By Mr. Witt (Continued):

Q. Mr. Mason, when you testified before the NLRB that this conversation with Travis about his resignation from the Communist Party took place in Chicago you were mis- [fol. 895] taken, weren't you?

A. Yes.

Q. Mr. Mason, can you tell us when it was that you found out that you had been mistaken in that respect?

A. No, I can't recall the time that I found out I made a mistake as to cities.

Mr. Witt: Just for continuity in view of the witness's reference to cities I would like to ask the following question.

Q. Mr. Mason, in other words, when you testified before the NLRB you testified that that conversation, you know the one I am referring to, took place in Chicago, and according to your testimony on direct examination here you testified that it took place in Denver, is that right?

A. Yes.

Q. So, the mistake was about the city, is that right?

A. Yes.

Q. It was not about the month, because in both cases you testified it was July, 1949, is that right?

A. I could not recall the day of the month.

Q. No, I wasn't asking you that.

A. Or the exact time.

Q. It was July of 1949 in both cases?

Mr. Witt: I withdraw it. I just wanted to make the record clear. I wasn't seeking to impeach him as to the date.

Q. Do you recall after you testified before the NLRB in May, 1954—or strike that, Miss Marson. I am sorry. After you testified before the NLRB in May of 19— I apologize to the Court. I withdraw that. While you were Executive Board member with Mine-Mill you were in the habit, weren't you, of submitting semi-monthly vouchers for your expenses?

A. Yes.

Q. Were you in the habit of keeping copies of those vouchers for yourself?

A. Yes.

Q. Now, after you testified before the NLRB in May, of 1954, did you examine the copies of your vouchers to check on this particular question as to what city that conference took place in?

Mr. Kelley: May it please the Court, it seems to me that he has established the fact that he made a mistake in his testimony before the NLRB, and there is no need to pursue it further.

[fol. 896] Mr. Witt: This is preliminary. I am going to something else.

Mr. Kelley: This is unnecessary cross examination.

Mr. Witt: It is preliminary to something else, if the Court please.

The Court: Well, on that basis I will overrule the objection.

Q. Do you remember the question, Mr. Mason?

A. Will you repeat it, please?

Mr. Witt: The reporter will read it back, please.

(The reporter read the question, as follows: "Now, after you testified before the NLRB in May, 1954, did you examine the copies of your vouchers to check on this particular question as to what city that conversation took place in?")

A. I knew that the conversation took place, so, I examined my vouchers, yes, trying to determine where I had made a mistake.

Q. And after you examined your vouchers did you determine that you had made a mistake about the city?

A. Yes.

Q. And at or about that time when you determined you made a mistake did you discuss that matter, that particular matter about your vouchers and mistake with the FBI?

A. I recall some discussion concerning the mistake with representatives of the FBI.

Q. And do you recall in the course of that you said you had referred to your vouchers for the month of July, 1949, is that right?

A. I don't hear you. You will have to raise your voice too.

Q. What?

A. I didn't hear you. Your voice is low.

Q. All right, I will keep my voice up.

Mr. Witt: I will withdraw the question if I may.

Q. Do you recall when it was that you discussed that matter with the FBI?

A. No, I don't.

(Document marked Defendant's Exhibit Q for identification.)

[fol. 897] Q. Mr. Mason, I now show you Defendant's Exhibit Q for identification. I will ask you to look at that page and the following page being our page numbers 15 and 16 and ask you to read those two pages to yourself, and I will ask you whether that doesn't refresh your recollection as to when you talked to the FBI about it. I also direct your attention to the top of page one where it states it.

Mr. Kelley: The Government objects to the question for the reason that it is going into a collateral matter. He is trying to show something in regard to his testimony on cross examination, and it is wholly collateral, a collateral issue. He has shown the fact that he made a mistake in his NLRB Testimony, and we object to pursuing this any further as a waste of the Court's time, and I would like leave of Mr. Witt and the Court to approach the Bench and submit this to the Court.

Mr. Witt: Before we do that—

The Court: The only question pending right now is with respect to whether this refreshes his recollection as to the time he gave this information to the FBI.

Mr. Witt: Yes, sir.

Mr. Kelley: Yes, and we say it is wholly irrelevant whether it refreshes his memory or not and when the time was.

The Court: You can answer the question. The question you are raising about the admissibility of any evidence is not before the Court now until Mr. Witt makes an offer to establish something. I think you can ask him if he knows the date.

Mr. Kelley: May I hand this to the Court?

The Court: Yes, you can hand it to the Court.

Mr. Witt: The same document?

Mr. Kelley: Yes, Exhibit Q.

Q. Do you remember the question, Mr. Mason?

A. I am sorry, I don't.

[fol. 898] Mr. Witt: The reporter will read it to you.

(The reporter read the question, as follows: "Mr. Mason, I now show you Defendant's Exhibit Q for identification.

I will ask you to look at that page and the following page being our page numbers 15 and 16 and ask you to read those two pages to yourself, and I will ask you whether that doesn't refresh your recollection as to when you talked to the FBI about it. I will also direct your attention to the top of page one where it states it.")

A. Yes, it does.

Q. Then, does it refresh your recollection that you talked to the FBI about that matter on August 24, 1954?

Mr. Kelley: The Government objects to this line of questioning, it is wholly irrelevant, it is a collateral matter.

The Court: The objection will be overruled as to this matter as to fixing the date. Now, you may proceed.

Mr. Witt: I am not going into the mistake any further.

The Court: Proceed with your next question.

Mr. Witt: All right.

Q. Do you remember the question, Mr. Mason?

The Court: He answered the question I thought.

Mr. Witt: I didn't think so. Mr. Kelley made the objection.

The Court: He can answer the question.

Q. Do you remember the question?

A. Does it refresh my memory as to the date of the conversation?

Q. Yes.

A. No, but the date appears there, and I assume that the date is correct.

Mr. Witt: Then, may the record show, I think it does already, so that it will be clear for the record and for the Jury, that the date the witness just—

[fol. 899] Mr. Kelley: That hasn't been received in evidence.

The Court: No. Let him proceed, Mr. Kelley.

Mr. Kelley: He is going to put in evidence what the document contains.

The Court: You can object when you find out what he wants to put in evidence. I have no idea. Continue, Mr. Witt, and make your offer.

Mr. Witt: All right. My offer is this short sentence from our page 15 which gives the date of this particular conversation the witness had with the FBI.

The Court: If there is an objection, I will sustain the objection to that, because the witness has testified that he has cleared his recollection and that this conversation did take place on the 24th.

Mr. Witt: That is all I was asking. I didn't think it reflected that it did take place on August 24, 1954. That is all I want.

Mr. Kelley: The witness said it did not refresh his recollection as to when it took place, but he assumed that the report was correct. I believe that would be the answer.

Mr. Witt: All right. All I want is to make clear that when he says he assumes the report is correct he assumes it is correct in stating that he furnished this information on August 24, 1954. That is all I want.

Mr. Kelley: I object to it as irrelevant.

The Court: No. If that is all, I think the objection will be overruled.

Q. Mr. Mason, you said that you remembered furnishing information to the FBI about Travis sometime in 1953. Do you remember the month in '53?

A. I was mistaken on that. The only information that I recall furnishing on Mr. Travis is a statement that I signed. [fol. 900] That was in 1955. I was asked on one other occasion something concerning Travis and myself, and I recall, I do not recall more than one interview with the representatives of the FBI on the subject of Travis. There were a number on the subject of Mine-Mill in general. I was mistaken as to the date of this statement which I signed which I had not prepared, but I had read it and signed it as the contents of an interview. To the best of my recollection the only time I discussed Travis was at that time, was 1955.

Q. Can you fix the month in 1955?

A. I can't recall the month.

Q. Now, did I understand you to say that was the statement which had been prepared and that you read it and signed it in 1955?

A. It was a statement that covered the interview between myself and representatives of the FBI.

Q. You had this interview with two agents?

A. I believe there were two present.

Q. And after the interview was it the FBI or agents who prepared this statement that you testified about?

A. It was typed at the FBI headquarters.

Q. And then one or both agents showed it to you and you read it and signed it?

A. Yes.

Q. Mr. Mason, so that will be clear, I will ask you whether you signed any other document containing information about Travis for the FBI any time since 1944.

A. Not that I recall.

Q. Aside from that occasion on which you signed the statement in 1955 I will ask you now whether you recall any other occasions on which you furnished information to the FBI about Travis.

Mr. Kelley: I think it has already been asked and answered.

Mr. Witt: No, sir. I am completing the record. I have a good deal of additional material.

The Court: The only thing that I am wondering about is the use of the "statements". If you change that to your conversations or talks or something of that sort, because I don't know whether you are referring to statements in a technical sense or as conferences.

Mr. Witt: All right, I am sorry. I will be happy to do so. May I have Miss Marson read the question back, and then I can rephrase it?

[fol. 901] The Court: Yes.

(The reporter read the last question.)

The Court: I think it said "statement".

Mr. Witt: I am not sure myself.

The Court: I am not either. All right.

Mr. Witt: Please add to that question "—since 1944."

A. I don't recall any other information given by myself to the FBI on Travis. There were a number of interviews, but—

Q. I didn't ask you anything except about Travis.

Mr. Kelley: Let him finish his answer.

A. There were a number of interviews with the FBI about Communists and Mine-Mill, perhaps Travis's name was mentioned, but I recall no specific information that I gave relating to Travis where Travis was the subject of the discussion.

Mr. Witt: I move that that part of the witness's answer in which he refers to interviews with the FBI in the course of which he furnished information concerning Communists and Mine-Mill be stricken.

The Court: The motion will be denied. One thing is very obvious here, this last date, this August date here that we just had, he admitted that he talked with the FBI Agents on that particular occasion. There is no showing that has to do with Travis. The question was with respect to his own testimony.

Mr. Witt: I am coming to that, but in this connection this witness like all these other Government witnesses is anxious to confuse the Jury about Communism and make them think they are going to pass a verdict on Communism instead of on the guilt or innocence of this defendant under our law. Every single Government witness will never—he has gotten into trouble in an effort—

The Court: There is no occasion, Mr. Witt, for that [fol. 902] speech at all, and the Court has ruled that the answer may stand, and you may proceed.

Q. Before you took the witness stand today did any of the prosecutors or Mr. DeCook suggest to you that when you wanted to stall for a little time on the witness stand that you throw in some statement about Communism?

A. I didn't get that question.

Mr. Witt: The reporter will read it back to you.

(The reporter read the last question.)

A. Of course not.

Q. Now, Mr. Mason, if I understood your answer, you said on these occasions Travis's name may have come into the conversation. Do you recall an occasion in August, 1953, when you had a conversation with Special Agent Zoeller about Travis?

A. I don't recall.

(Document marked Defendant's Exhibit R for identification.)

Q. Mr. Mason, I show you Defendant's Exhibit R for identification and ask you to look at that, read as much of that page and the following pages as you want to, and I will ask you whether that doesn't refresh your recollection that you had a conversation with Agent Zoeller in Butte, Montana, U. S. A., on August 7, 1953.

A. What was the question again?

Mr. Witt: The reporter will read the question.

(The reporter read the last question.)

A. Yes, it does.

OFFER IN EVIDENCE

Mr. Witt: This is a one-page report, Defendant's Exhibit R for identification, and I now offer it in evidence.

Mr. Kelley: Well, your Honor, we have no objection as such to this going into evidence. We do object to this line of cross examination, because it is an attempt to impeach him on his statement on cross examination that he didn't remember how many times he talked to the FBI Agents, and it is purely collateral, and to impeach one it should be [fol. 903] on a matter that is material, and it should be on something that he has testified to on direct examination. For that reason we object to it.

The Court: This goes, as I understand it, it is their contention, to one of the things to consider in connection with the weight to be given his testimony which obviously would not be some matter that arises on direct examination. That is your position, isn't it?

Mr. Witt: It is more than that, your Honor, and I do not hesitate to state it in open court. That is one purpose of it, and the other purpose of it is to show that at that time, which is the period he has testified about, he was telling the FBI about these conversations with Travis about which he testified on direct examination. This man was in touch with the FBI at all times, and we want to show—

The Court: You need not add that. The Jury are going to be the judges of the evidence.

Mr. Kelley: That is just the point. How many times he was in touch with the FBI is an immaterial issue.

The Court: It seems elementary, a witness, laying aside this testimony and using a hypothetical case, a witness might say he saw an individual in a certain period, on cross examination it would be relevant for them to show that he said he saw the individual several times solely and wholly for the purpose of testing the witness's recollection in matters of that kind, going to the weight to be given the testimony.

Mr. Kelley: I would say, your Honor, that would be true if his seeing that person had any material relationship to the issues in the case, but how many times he saw the FBI Agent has nothing to do with his testimony.

The Court: That is a question for the Jury, so, if there is no objection other than the one you have mentioned, why, the matter may be received in evidence, whatever it was, was it offered by an exhibit number or page number?

Mr. Kelley: It is Exhibit R which consists of pages nine, ten, and 11 as we have marked the document submitted to the defense under 3500.

[fol. 904] Mr. Witt: Mr. Kelley I think is mistaken in what he just said. May I talk to him for a moment off the record and we won't waste time on it I am sure?

Mr. Kelley: I did misspeak. It is only page nine.

The Court: It has been marked as an exhibit or by a page number?

Mr. Kelley: Exhibit R.

Mr. Witt: I will make it clear now.

The Court: What you are offering is what now?

Mr. Witt: Defendant's Exhibit R which has been marked for identification and which is our page number nine.

The Court: Page number nine is what is involved, and that will be admitted in evidence.

(Defendant's Exhibit R for identification received in evidence.)

Mr. Witt: May I have your Honor's permission to read it to the Jury?

The Court: Yes, you may read it to the Jury.

Mr. Witt: May Mr. Deikman read it to the Jury and I can sit down?

The Court: Yes, he may.

Mr. Deikman: On the upper lefthand part of the page is the designation "SAC WYLY SA Zoeller, August 10, 1953. William Mason orally advised on August 7, 1953, that his fight with the Travis machine in Mine-Mill was apparently breaking into the open. He stated that Travis had settled the Union's dispute with A. S. and R. for eight and a half cents per hour and had also, without checking with the other sections of the Union, extended the contract to 1956.

"Informant said that Travis, feeling quite pleased with [fol. 905] himself over this, had erroneously interpreted a proposal made to the Anaconda Copper Mining Company as amounting to only six cents an hour and had severely criticized the Executive Board members for District No. 1 and the Montana locals. Informant said that in fact the proposal to the A. C. M. Company was much greater than eight and a half cents per hour.

"As a result, the Montana members were very upset with the International officers and were demanding to know what was going on. Travis realizing his error flew in from Denver and had a conference with William Mason and John Clark. Travis urged that there be no interunion split and that the Union should present a united front to the various companies.

"William Mason really told Travis off including charges of Communism on the part of Travis.

"Travis, calling a meeting of the Union's Wage Policy Committee in Denver for August 10, 1953, urged William Mason to come early to the meeting to meet with him, noting that they could settle their differences. To counter this move on the part of Travis, Mason has called a meeting of the Anaconda Wage Council for Denver on the same date. Informant said that the open fight is becoming greater every day and this is the beginning of a definite anti-Travis move, at least on the part of the Montana locals.

"Informant stated that he would contact the writer upon his return from Denver."

Q. Now, Mr. Mason, you just heard Mr. Deikman reading from this document that according to Agent Zoeller's report you told him, Agent Zoeller, on August 7, 1953, that you "really told Travis off including charges of Communism on the part of Travis." Do you recall saying that to Agent Zoeller in August of '53?

A. I don't recall saying anything like that. I recall it was a conversation with him concerning the situation in the Union. I do not regard that conversation as giving information on Travis as to the question whether he is a Communist or not.

Q. Do you recall that you told Agent—

[fol. 906] The Court: May I inquire, what is the purpose of this with respect to the simple fact that he had this discussion, not with respect to what was said or done? The witness testified in response to your question a while ago that as to the occasions upon which he had given statements or information, rather, relative to Mr. Travis, he continued and said in other discussions about other matters Travis's name had been mentioned. The Jury have to determine in what category this statement comes. It speaks for itself, and the only purpose was to show that there was such a statement given on the date indicated. I do not know that the subject matter is important. It is in evidence and it speaks for itself.

Mr. Witt: I am now going off on another line. I cannot be expected to make a speech every time I go off on a line saying what I am going to seek to prove. Obviously, I should not be required to do it. This is a preliminary question on another line, and, if your Honor wants me to indicate what the line is, I do not want to do it in open court in front of the witness, and I think it would be improper in front of the Jury.

The Court: Well, I think we had better leave that, and you can mention it to the Court in Chambers.

Mr. Witt: This is a very long line, and this problem of having to revise the course of cross examination I have prepared makes it extraordinarily difficult for me to do this job. I would be very happy to come back early if your Honor would consider it and it would not be an imposition

on the Jury so that we could dispose of this problem if we recess now.

In Chambers

Colloquy Between Court and Counsel

* * * * * * *

[fol. 911] The Court: I thought we could point this thing up more specifically. From the trend the discussion has taken I expect the only thing I can see to do is to proceed in the courtroom and just take the thing as it comes and rule on it as it is, but I think there ought to be some fundamentals that we give consideration to. Mr. Witt is a very [fol. 912] experienced cross-examiner, that is obvious, and the Court has no desire whatsoever to in any way hamper or interfere with his own method of proceeding with his cross examination, but I apprehend a very basic rule that must be observed in this in substance: that if a question on its face is relevant and an objection is made on the grounds of irrelevancy, the Court can pass on the matter right on the face of the question. If the relevancy isn't apparent, then the counsel who propounded the question has the burden of explaining why it is relevant or, if it is a preliminary question or something of that sort so that the Court may rule with respect to the objection with respect to irrelevancy. The Court cannot sitting up on the Bench fathom the thinking in counsel's mind that he has in view of some question. The objection is made on the grounds it is irrelevant, and the Court is immediately faced with the problem, there is nothing on the face of the question to show relevancy. So, I think there is no escape from then inquiring, "Why is it relevant," because otherwise, the Court could not pass on the thing.

Mr. Witt: Absolutely, your Honor. I am glad your Honor said that, and I think it may help us during the rest of the trial. I tried to raise this very problem this morning, and it is a problem that I have had with your Honor in my cross examination from the beginning. First, may I just say this in passing, and, again, this particular situation with Mason illustrates this, your Honor, that unlike the normal criminal case where you are dealing usually with

a physical event, robbery and narcotics and the rest of it, the line of cross examination by defense counsel is apparent to everybody usually. There are exceptions. In this kind of a case with these peculiar circumstances that we have, your Honor, it is not the same situation, so, I have no dispute with what your Honor just said. Quite the contrary. I have been hoping there would be more opportunity for us to be able to answer your Honor's question as to the relevancy of a particular question.

Now, in that connection there is a physical difficulty in this courtroom that I remembered we had at the beginning of the trial before Judge Breitenstein because of the setup. As I tried to say this morning, your Honor, and I protested about it, there is the difficulty of approaching the Bench, especially since these matters are so often this complicated, and trying to explain to your Honor without being overheard by the Jury and the witness.

[fol. 913] The Court: My own feeling about approaching the Bench business, there are plenty of occasions when it is helpful, but it doesn't take the place of any objections or anything else. There are some times there is something comes up about identification of an instrument or showing me what is going to be read that it is proper, but you can bear in mind that nothing that is said at Bench conferences gets in the record at all, and the net result is that the thing is meaningless. There ought to be something that is in the record. There are plenty of occasions when it is helpful, I grant that.

The second thing that is so obvious, but I think it should be mentioned in connection with your statement about what you expect to show by this witness, that the basic restraint on that is something that is within the field of the direct examination or the secondary field of something that relates to the credibility of the witness. It is admissible on that basis, some extraneous thing that would reflect on credibility. That must be borne in mind.

Then, one thing, for instance, getting to the point where we stopped, apparently, as I understand from your statement here, that you wish to offer something on the theory that is in contradiction with some of his testimony on direct in this case. Now, I never in the world associated it

with that from the form of the question or anything else. I would think in those kinds of cases the first thing to do would be to call the witness's attention to what he testified in this case, I mean when you start on a new field, something that has been testified to, and then call attention to whatever you think is contradictory or inconsistent or whatever it may be with that. Then, of course, the procedure is obvious, and the question then, of course, would be whether the matter is in contradiction, but I do not know that we can make any specific rulings or arrangements here about the thing at all.

Mr. Witt: On that last point, your Honor, I think, if I follow you, that is an impossible assignment for me. You take this very problem, how can I lay a foundation by trying to summarize his testimony both on direct and cross with respect to these matters particularly? May I say this, I had forgotten, of course, through all of this goes the issue of credibility. In view of his answers about his talks with the FBI, which quite astonish me, I think I am entitled to show the whole course of the history with the FBI. [fol. 914] The Court: I do not know what you mean by that, of course, and I do not quite follow that that question would arise on a specific question. If you mean, I don't know exactly what you do mean.

Mr. Witt: May I say it in a word? I am still not sure that I follow his answers, but he has been saying he doesn't remember these other occasions when he talked to the FBI. Now, I want to go back to his whole history as to when he actually did first talk to the FBI. We are not bound by the earlier statement and the statement furnished to us.

The Court: What you said just now is perfectly proper, I think, as I have pointed out at the very beginning here, and that is the theory I have been letting these questions be answered with respect to, "You talked to him on such and such a day," because he has fixed the time as to when he did talk to them, and anything that you might say is inconsistent with that, or, not consistent with it is probably a better way to say it, might reflect on his recollection or something of that sort, but I would not attempt to say what the question was that this matter arose over, but I

venture to say, and, if you want to look at the record, there was nothing in the question to suggest that was the purpose at all.

If you are attempting to show that the statement he made, it wasn't admitted on that basis I guess we all agree, is contradictory with any of his direct testimony in any of his testimony here in this trial, of course, it could be considered for that secondary purpose of contradiction or inconsistency. There is nothing up to date to show anything. If that is what you are aiming at, I didn't know.

Mr. Witt: Again, with this particular question about this sentence in that document, then, if that is permitted and he answers that, then I will get to the Leggat Hotel conversation, and I want to ask him whether he didn't discuss his plans to meet Travis before he actually did meet Travis, so, I will show that he had a discussion earlier than this one on August 7 about Travis, and I also, as I have already indicated, want to try to show that before he called Travis on the long-distance telephone late in July [fol. 915] that he discussed that with the FBI. So, all that would contradict—

The Court: Where has he testified to anything inconsistent with that in the trial?

Mr. Vincent: I cannot see the relevancy of it.

The Court: I cannot see on the face of that statement the relevancy. The relevancy is what I do not see.

Mr. Vincent: Might I say also in regard to Mr. Witt saying he wants to go back to the first time that this witness talked to the FBI, I might ask Mr. Witt in relation to what?

Mr. Witt: About Travis.

The Court: I think he has already been into that two or three times.

Mr. Witt: But I am entitled to make the whole record. I have already contradicted him. He said he gave this signed statement of his own, the only one he remembers to the FBI.

The Court: I think that is water under the bridge. You have asked him a number of times, again, if my memory is correct, with respect to when he talked to them and so forth, and on his own admission he was mistaken on the

date he gave in the first instance and fixed this other date.

Mr. Witt: I want to show his answer, that his memory is incredible, I want to show he is lying.

The Court: I don't believe we are getting anywhere with this discussion. I think we had better go ahead just probably on the question and answer basis, because I mean it is not like a situation where we have one problem and you can say, "Well, you can answer this question or you asked this question," but this involves numerous things.

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[fol. 919] Afternoon Session

WILLIAM MASON, resumed the stand, and testified as follows:

Cross examination.

By Mr. Witt (Continued):

Mr. Witt: Your Honor, we have given further thought to the pending question which we discussed in Chambers during the recess to which there is a pending objection by the prosecution. Will your Honor rule on that objection now so we will know how to proceed?

The Court: Well, I think I will sustain the objection to that question on the basis of form as I recall it. If you wish the record read, you may do it. I am not exactly sure as to the form of the question. I know the general problem, but I think I will sustain the objection and you may proceed.

Mr. Witt: May I have it read if it is not too difficult for Miss Marson, and then maybe I can rephrase it?

[fol. 920] The Court: You may proceed, and I will rule on the question now if there is an objection, it it is along the same line. I do not recall specifically the question.

Q. Mr. Mason, do you recall that in the conversation with Special Agent Zoeller on August 7, 1953, that you told him that you had "told Travis off including charges of Communism on the part of Travis"?

The Court: I think the witness was permitted to answer that question and gave an answer along the line that he

didn't recall or something to that effect. Is that counsel's recollection?

Mr. Kelley: I believe that it is substantially right, your Honor.

Mr. Witt: May we ask the witness again?

The Court: I think, Miss Marson, we will wait and get the end of this thing. I think he answered that question already.

(The reporter read the question and answer, as follows: "Question: Now, Mr. Mason, you just heard from Mr. Deikman's reading of this document that according to Agent Zoeller's report you told him, Agent Zoeller, on August 7, 1953, that you 'really told Travis off including charges of Communism on the part of Travis.' Do you recall saying that to Agent Zoeller in August of '53? Answer: I don't recall saying anything like that. I recall it was a conversation with him concerning the situation in the Union. I do not regard that conversation as giving information on Travis as to the question whether he is a Communist or not.")

Mr. Witt: I am sorry. I apparently was mistaken.

Q. Do you remember telling Agent Zoeller or any other agent of the FBI in Butte about the conversation you had had with Travis in the Bar of the Leggat Hotel in Butte?

A. Yes. However, I don't remember when.

Q. Will you tell us again what was the date of that conversation in the Leggat bar according to your best recollection?

A. Well, of course, the conversation was in 1953.

Q. When in '53, Mr. Mason?

[fol. 920a] A. I think it would be in the latter part of July. Right at the moment I cannot say for sure, but the impression in my mind at this moment is it was in the latter part of July.

Q. Now, in view of that answer, Mr. Mason, that the conversation with Travis at the Leggat Hotel was the latter part of July, I will ask you to look at Defendant's Exhibit R again, that is in evidence now, if the Court please, page nine was read in by Mr. Deikman, the sentence I

asked you about this morning and whether that doesn't refresh your recollection that it was on August 7 that you told Agent Zoeller about the conversation.

The Court: That wasn't your question. Your question was, when was the conversation with Mr. Travis, wasn't it?

Mr. Witt: No, I am done with that. He has answered that. Now, I want to ask him whether his recollection is refreshed now that he has said this conversation with Mr. Travis was late in July, that it was on August 7 that he told Agent Zoeller about that conversation, and that is what this sentence refers to.

The Court: If there is any contradiction in that statement which is in evidence, it is before the Jury, and what is the purpose?

Mr. Witt: It is not a contradiction, your Honor. It is in terms of the purpose of this that I tried to explain to your Honor in Chambers, I want to show that he did report on all of these developments to the FBI.

The Court: He just said he did.

Mr. Witt: Well, no, but he didn't recall when it was when I asked him earlier.

The Court: I didn't understand the question then.

Mr. Witt: Let me ask him again if I may. I think it will save a little time. I am asking him now to look at that document relating to his conversation with Mr. Zoeller.

The Court: That is already in evidence.

[fol. 921] Mr. Witt: I am using it to refresh his recollection.

The Court: What?

Mr. Witt: I am using it to refresh his recollection.

The Court: All right.

A. I don't remember of a detailed discussion that took place years ago. This is an old document. I haven't seen this before.

Q. Mr. Mason, I didn't ask you that about the details. I am simply asking you whether your recollection is now refreshed looking at that document that it was on August 7 that you told Agent Zoeller about your conversation with Travis in the Leggat Hotel Bar late in July.

A. Refreshed as to date or content?

Q. As to date that you told Agent Zoeller.

A. No, I don't remember the incident with respect to date or detailed conversation.

Q. Now, Mr. Mason, with reference to your testimony last week on direct examination about the telephone call you made to Travis from Butte to Denver in July of 1953 I will ask you whether before you made that telephone call you told an Agent or Agents of the FBI that you were going to make that telephone call.

Mr. Vincent: The Government objects to that, your Honor, as being irrelevant.

The Court; What is the relevancy?

Mr. Witt: Well, your Honor, I thought it was in order to avoid this discussion in open court that we had discussion in Chambers. The relevancy is based on what I stated to the Court in Chambers during the recess.

The Court: I don't recall that in Chambers we agreed upon any specific line of examination or anything else.

Mr. Witt: No.

[fol. 922] The Court: And I think I indicated then that I was going to ask counsel what the relevancy of the question is.

Mr. Witt: I wasn't trying to say that we agreed. All I was trying to say is that I advised your Honor and Mr. Kelley as to what the purpose of this line was. If your Honor wants me now to point that out again, I will be glad to do so, but I wonder whether we should do it in open court.

Mr. Kelley: May it please the Court, it seems to me that the question on its face shows that it is irrelevant and there is no point in arguing it.

The Court: I think I will sustain the objection.

Mr. Witt: I am satisfied with the record I made in Chambers on this, your Honor.

The Court: All right.

Q. At any time before August 7, 1953, did you furnish any information to the FBI about Travis?

Mr. Kelley: May it please the Court, it has been asked and answered.

Mr. Witt: No, I don't think it has in that form. Again, I refer to the conference in Chambers.

Mr. Kelley: May it please the Court, it is merely changing the form. It is the subject matter that he is going into again. He asked him when he first made his report and how many he had made and all of that.

Mr. Witt: No, it could be at the beginning in order to lay a foundation for it I asked him generally.

The Court: I mean is this question—read the question, please, Miss Marson.

(The reporter read the last question.)

The Court: The objection will be sustained on the basis that the question has been answered several times.

[fol. 923] Q. In August of 1953, on August 7, 1953, were you an informant for the FBI?

Mr. Kelley: May it please the Court, the Government objects to that as calling for a legal conclusion of the witness.

The Court: The Court will sustain the objection.

Q. Mr. Mason, at any time before August 7, 1953, did you receive any payments from the FBI for furnishing information to the FBI?

A. Definitely not.

Q. At any time after August, 1953, until you left Mine-Mill, Mr. Mason, did you receive any payments from the FBI for furnishing information about Travis or Mine-Mill?

A. No. I am opposed to anyone receiving payment for services to his country, and I think cooperation with the FBI in these matters is a service to my country.

Q. In August, 1953, you were still Executive Board member of District 1 of Mine-Mill?

A. Yes.

Q. Did you advise any official of Mine-Mill or any member of Mine-Mill in August, 1953, at the time you were Executive Board member that you were furnishing information to the FBI about the negotiations that Mine-Mill was then carrying on with the employers?

Mr. Kelley: I thought that question started out to be something else.

The Court: There is no objection? Then, you may answer, Mr. Mason.

A. I am not sure I understand the question.

The Court: You can have it read. Do you wish to have it read?

The Witness: Please.

The Court: All right.

(The reporter read the last question.)

Mr. Kelley: Well, the question was what I thought it was [fol. 924] going to be. I lost it somewhere. I do object on the ground it is irrelevant.

The Court: I will sustain the objection as to the form of the question. I do not see the relevancy limited as the question is to that matter.

Mr. Witt: May I try to point out the relevancy as I see it, your Honor?

The Court: It is to the form of the question, is the basis of the objection.

Mr. Witt: Mr. Kelley and the Court have pointed out why the question is objectionable in form. If Mr. Kelley objects, I will be glad to try to restate it.

The Court: You can restate the question if you wish to try again.

Q. Mr. Mason, in view of your testimony a moment ago that you were furnishing information to the FBI as a patriotic service did you in August, 1953, advise or tell any official of Mine-Mill or any member of Mine-Mill that you were performing a patriotic service by reporting to the FBI Mine-Mill's negotiations with employers and the fight you were carrying on within the Union on that problem?

Mr. Kelley: May it please the Court, we object to it as to form.

The Court: I will sustain the objection.

Q. Mr. Mason, do you recall any time in August, 19— strike that, please, Miss Marson. Mr. Mason, in August, 1953, was there a Wage Policy Committee meeting of Mine-Mill here in Denver?

A. Yes, sir, I believe there was.

Q. That was after the conversation you had had with Travis in the Leggat Bar, is that right?

A. Yes. I am not sure what type of a meeting it was. To the best of my recollection it was a meeting having to do with bargaining that year.

Q. Did you say you don't remember what kind of a meeting this was in Denver?

Mr. Kelley: He stated what kind it was.

[fol. 925] Mr. Witt: I do not want Mr. Kelley to testify.

The Court: He has answered. He didn't say what you attributed to him.

Mr. Witt: All right. Will you read the answer, Miss Marson?

(The reporter read the last answer.)

Q. Well, Mr. Mason, do you recall testifying under direct examination last week on January 23, page 1035, when Mr. Crandall was beginning to ask you about your conversation with Travis which began at the Sears Hotel where you said you met Travis, and I quote from the witness's answer: "Well, it was immediately after the Wage Policy Conference in Denver, perhaps a session or two of the Executive Board." You remember that?

A. Yes.

Q. So, it was a Wage Policy Conference, is that right?

A. Yes, but often these meetings were more of a get-together of what we call the Spear Holders, and sometimes it was very difficult to distinguish whether it was a meeting of the rank and file representatives on bargaining or whether it was a rally of the Communists within the Union. That is why I hesitated in pinning it down to exactly a formal wage policy meeting. I think the meeting was packed. But it was a wage policy meeting.

Q. Do you recall that when you talked to Mr. Zoeller in Butte on August 7 you told him that Travis had called a meeting of the Union's Wage Policy Committee in Denver for August 10?

A. I don't recall it. I very likely did.

Q. Well, since you seem to have a little doubt, I will show you.

The Court: That is in evidence, Mr. Witt. This is just argument with the witness. If there is anything contradictory there, it is already in evidence.

Mr. Witt: The witness qualifies his answer.

The Court: What is the difference, because I guess both of you agree it was the time the conversation was held, and what you label the meeting, he has explained his designation of it.

Mr. Witt: I have a different purpose in mind as I ex- [fol. 926] plained in Chambers. I won't do it again in open court. Would you please read the last question and answer?

(The reporter read the last question and answer.)

Q. Isn't it true then, Mr. Mason, according to your present recollection that when you talked to Mr. Zoeller on August 7 you not only told him about the Leggat Hotel conference in Butte with Travis late in July but you also told him that there would be a meeting of the Wage Policy Committee in Denver on August 10?

Mr. Kelley: May it please the Court, that matter has all been gone into, and it is in evidence.

The Court: I will sustain the objection.

Q. Do you recall that on August 7, 1953, you told Mr. Zoeller that you would contact him upon your return in Denver from the Wage Policy Committee meeting?

Mr. Kelley: May it please the Court, that is irrelevant.

The Court: The objection is sustained.

Mr. Witt: That is for the purpose, all this is for the purposes I explained in Chambers. I am merely making the record.

The Court: Very well, the objection is sustained. The statement you have has all been received in evidence, and it stands and speaks for itself. Any matter in it may be referred to. There is no purpose for this examination as the Court sees it. That is the reason for sustaining the objection.

Mr. Witt: I think I understand your Honor, but, as I explained in Chambers, I want to refer to this material in a preliminary way to go into something else.

The Court: The objection will be sustained.
Mr. Witt: All right, sir, I understand.

Q. Mr. Mason, do you remember a second occasion in August of 1953 when you talked to an agent or agents of [fol. 927] the FBI in Butte about Travis?

A. I don't remember talking to an agent of the FBI about Travis as an individual at any time except on the occasion of signing a statement which was an account of an interview with them, and the subject was Travis and his activities, his conversations with me and so on. The rest of the conversation with the FBI that I recall was on the question of the Union, the control of the Union by Communists, my own position in the Union, fighting them, and things that I regard as not having to do with Travis as an individual but Travis as the boss of the group that I was in opposition to.

(Document marked Defendant's Exhibit S for identification.)

Q. Mr. Mason, I now show you Defendant's Exhibit S for identification consisting of two pages being our pages ten and 11, the first page of which bears the date August 18, 1953. I will ask you to read those two pages or as much of them as you want and ask you whether that doesn't refresh your recollection that on August 15 you talked to the SAC in Butte or some other agent in Butte about Travis.

A. I think I answered this question before. I remember talking to the representatives of the FBI. I can't recall in detail the conversation nor am I responsible for necessarily the language contained on that page. That is the first time I saw it. I will, however, assume responsibility for the statement that I signed which I read carefully which I know are things that I said.

Mr. Witt: At this time, I will offer in evidence Defendant's Exhibit S for identification.

Mr. Kelley: May it please the Court, as to Exhibit S it is the Government's position that there hasn't been sufficient foundation laid to show that this is a statement of the witness which he has adopted in anywise. Part of it is

irrelevant, but, and, we feel it might encumber the record in the court. However, as to the content we have no objection to it.

The Court: Well, as I have indicated before, I have ruled on the question, the first part of your objection, it has been the position of the Court that the Government furnished these statements as being statements within the meaning of Section 3500, Title 18, U. S. C., and the Court has accepted them as coming within that category. So, the first [fol. 928] part of your motion will be overruled. I understand you have no objection otherwise, is that right?

Mr. Kelley: Well, except that it unnecessarily encumbers the record.

The Court: Well, I don't quite get the significance of that.

Mr. Witt: I take it Mr. Kelley means that all cross examination encumbers the record.

Mr. Kelley: I don't mean that at all, Mr. Witt.

The Court: I do not think that is called for either.

Mr. Kelley: It is just cumulative.

The Court: This record is long enough now, and just a page or two won't make any difference. The objection will be overruled.

(Defendant's Exhibit S for identification received in evidence.)

Mr. Witt: May I ask permission to have Mr. Deikman read this to the jury?

The Court: All right.

Mr. Deikman: This reads, "Director, FBI, SAC, Butte, August 18, 1953. William Mason orally furnished the following information on August 15, 1953:

"Maurice Travis, National Secretary, International Union of Mine, Mill & Smelter Workers, settled the Union's contract dispute with the American Smelting & Refining Company for eight cents an hour and also extended the contract for two years. Travis then heard of a counter proposal made to the Anaconda Copper Mining Company in Montana which proposal Travis interpreted to be six cents per hour. Mr. Mason says that the proposal 'which is tricky and difficult to understand,' actually amounts to two

and one-half cents times the eight cents per hour that Travis settled for. Travis thereupon sent a wire to locals all over the country accusing the Montana group of selling [fol. 929] out the Union. Upon hearing of this, Mason telephonically contacted Travis and accused him 'and his Communist gang' of being so anxious to 'get the Montana opposition' that he had slandered the Montana group and had also violated a longstanding Union policy of not extending contracts for more than one year.

"Travis then came by air to Montana and Mason told Travis that the 'fight was really on' and that the fight was going to be on the Communist issue. Travis then called a meeting of the Union's National Negotiating Committee in Denver for the week of August 9, 1953.

"During the Denver meeting, Mason again 'accused the Communist gang' of having gone too far in their efforts to get the Montana opposition out of the Union. Travis, although stating that he and Mason would iron out their differences, was at the same time pointing out that a fight was futile, because he, Travis, had the votes and the control.

"Informant as of August 15, 1953, was not certain what his course of action was going to be, but he states that he feels to compromise now would never work as Travis and his machine would eventually 'get him.' He states that he knows that the Montana group will get a charter from either Walter Reuther of the CIO or John L. Lewis of the United Mine Workers and is seriously considering contacting one or both of these individuals with the view of having the Montana section secede from Mine-Mill. In the meantime he intends to organize the Montana locals into what he calls 'a vicious fight on the Communist issue.'" There is deleted material and then following, "The above is submitted for the information of the Bureau and the Denver Office."

Q. Mr. Mason, going back to your telephone call to Travis in July, 1953, did any agent of the FBI or any other agent of the Government advise you before you placed that telephone call to Travis that arrangements would be made to have that telephone conversation tapped by a mechanical device?

Mr. Kelley: The Government objects to that as irrelevant and immaterial.

The Court: I think I will let him answer the question. [fol. 930] You can answer the question.

A. The telephone call to Travis was as a result of extreme anger on my part at the dirty tactics that Travis and the Communists were employing against me and was not as a result of any previous discussion with anyone but especially not with the FBI. I resent what I think is an effort to smear my reputation after this trial is over.

Q. During the luncheon recess, Mr. Mason, did one of the prosecutors advise you that the question of your reputation after this trial is over was discussed in Chambers with the Court?

A. No. I know this from my long experience with Communists within the Mine, Mill & Smelter Workers, personal difficult experience. I know this is a result of the original trial of Travis when reports were sent from the Union Headquarters here in Denver to the field making me out a liar and everything else on the witness stand. I am sorry, your Honor, if I have some feelings on this question.

The Court: All right.

Q. During the luncheon recess did any of the prosecutors or Mr. DeCook suggest to you that you display some indignation on the witness stand about my questioning?

A. Of course not. They did, however, tell me during the recess this morning, Mr. Crandall told me that it is the witness's privilege to explain his answer at times. He also admonished me to speak louder so that the Jury and everyone can distinctly hear.

Q. In this conversation you had with Travis, telephone conversation you had with Travis in July of '53 you told him that you had been invited to testify against him, didn't you?

A. Yes, I did.

Q. Who invited you to testify against him?

A. Representatives—

Mr. Kelley: That is a side issue and collateral and irrelevant to the matter.

The Court: Well, I think I will let him answer the question. You may answer, Mr. Mason.

A. The invitation was in the form of a question, would I testify against Communists in Mine-Mill including Travis. [fol. 931] I said by way of an answer that, "I think I can do better fighting Communists where I am within the labor movement than from a witness chair." I still incidentally believe I am more effective in the other field.

Mr. Witt: I do not think you answered my question, Mr. Mason.

The Court: I think he did. You can have the question read.

(The reporter read the question, as follows: "Who invited you to testify against him? Answer: Representatives—")

Q. I will ask you again just to save a little time, who was it that asked you to testify against Travis?

A. Tom Zoeller and the only person that I know within the FBI that I have had more than one conversation with.

Q. And when was it that Tom Zoeller asked you to testify against Travis?

A. Sometime before this conversation with Travis over the telephone. I cannot recall the date.

Q. Was it a very short time, a few days or a few weeks or a few months?

A. I cannot recall. I know it was before the conversation with Travis by telephone.

Q. At that time you had known Tom Zoeller for a long time, hadn't you?

A. No, I did not.

Mr. Kelley: May it please the Court—

The Court: He has answered the question.

Q. On the occasion when Mr. Zoeller asked you to testify against Travis did he ask you first whether there was testimony you could give against Travis?

Mr. Kelley: May it please the Court, I think he has pursued this far enough.

The Court: I will sustain the objection.

Q. Any time before Mr. Zoeller asked you to testify against Travis and since you first got to know Mr. Zoeller

before July, 1953, had you given him information about Travis?

[fol. 932] Mr. Kelley: May it please the Court, it has already been asked and answered.

The Court: I will sustain the objection.

(Document marked Defendant's Exhibit T for identification.)

Q. Mr. Mason, I show you Defendant's Exhibit T for identification which consists of several pages beginning on our page 18. I will ask you to look at it and tell us whether you recognize what that document is. Mr. Mason, that consists of 11 pages.

A. I believe I know what it is.

Q. Will you tell us what that is?

A. I was looking for my signature, but it is the only statement that I signed for the FBI. It has to do with the general situation within the Union mostly as discussed between Travis and myself.

Q. Is that a copy of the statement that you referred to this morning when you said that you gave the FBI one statement that you yourself had prepared in 1955?

Mr. Kelley: That is a misstatement of the record. He didn't say he had prepared it himself. He said they prepared it.

Mr. Witt: I apologize. The witness said he talked with the FBI and then it was prepared in the FBI office and shown to him and he signed it.

Q. Is that the one you talked about this morning?

A. Yes. I looked for the signature and didn't find it.

Mr. Kelley: I think it is on page 11.

Mr. Witt: Our page 11?

Mr. Kelley: Page 11 of the document.

Q. Will you look at that and see whether that is your signature?

A. Yes.

Q. And that also refreshes your recollection that the statement is dated April 12, 1955?

Mr. Kelley: It speaks for itself, the document.

[fol. 933] Mr. Witt: I am not offering it. I want to get the date out of the way so I can go to something else.

Mr. Kelley: We will stipulate that the document shows that it was dated April 12, 1955.

Mr. Witt: All right.

Q. At any other time in 1955, Mr. Mason, do you remember talking to Mr. Zoeller and giving him information about Travis?

Mr. Kelley: May it please the Court, the witness has answered the question. If counsel has documents that he is specifically referring to—

The Court: I will sustain the objection. I think the witness has answered the question a number of times.

Mr. Witt: Not in this specific form, your Honor, but I will show them to the witness, and maybe we can get the remainder of these I am interested in at once. If the Court will give me a minute with Mr. Kelley, I will show him what I have in mind. We perhaps can save a little time.

The Court: All right.

Mr. Kelley: I think you had better go ahead in fairness to the witness.

Mr. Witt: I will have to ask him a preliminary question if we cannot stipulate in view of what Mr. Kelley said.

Mr. Kelley: I have got to be fair to the witness.

Mr. Witt: I want to be fair to the witness too. All I am interested in is the proof the same as you are.

The Court: Ask him the question.

Q. Do you remember any other occasions in 1955 when you gave Tom Zoeller information about Travis aside from the statement you signed April 12?

The Court: I will sustain the objection.

[fol. 934] Mr. Witt: I thought Mr. Kelley said we could go ahead.

The Court: He has testified. You don't need to go into it every time you propound a question. He has testified what information he gave with respect to Mr. Travis and

testified he had other interviews in which Mr. Travis's name might have been mentioned. He has answered the question two or three times.

Mr. Witt: At this time, if the Court please, I offer in evidence—I don't think it has to be marked, your Honor, in view of our understanding and agreement that we can offer any of this furnished by the Government at any time.

The Court: Yes, you can offer it at any time.

Mr. Witt: Yes, any parts of it we think are relevant. I now offer from our page 29—

The Court: You had better interrogate. I do not know what it is. You had better ask the witness if it is about a meeting, whether they had the meeting, because he is entitled for his own information to see the thing and to give his version of it. It may be admissible in evidence.

Mr. Witt: May I have it marked?

(Document marked Defendant's Exhibit U for identification.)

The Court: You can ask him whatever you wish.

Mr. Witt: I am interested in having two reports marked, and then we can perhaps save time.

The Court: All right.

Q. Mr. Mason, I will ask you to look at Defendant's Exhibit U for identification consisting of three pages beginning on our page 29 and ask you whether that doesn't refresh your recollection that you talked to Mr. Zoeller on April 13, 1955, which date I am pointing out to you appears on the second of these three pages.

A. I remember the conversation, not in detail, however.

Q. Mr. Mason, were you born in this country?

A. No, sir.

[fol. 935] Mr. Vincent: If your Honor please, the Government objects to that.

The Court: I will sustain the objection.

Mr. Witt: I would like to be heard on that, your Honor.

The Court: I think I will let him answer the question, and you may answer, Mr. Mason.

A. No.

Q. Where were you born?

A. I was born in Europe.

Q. What country?

A. In Yugoslavia.

Q. When did you come to this country?

A. Nineteen twenty-three.

Q. And were you thereafter naturalized as an American citizen?

A. Yes.

Q. Now, on direct examination I think you testified that you had been a member of the Communist Party for a previous period in the 1930's. Do you remember that testimony of yours?

A. Yes.

Q. Did (sic) you tell us more exactly when you joined the Communist Party and when you left the Communist Party?

A. I cannot. I was quite young. At that time the period is quite obscure to me.

Q. At any time after you had been a member of the Communist Party were you interrogated about that by the Immigration Service?

Mr. Kelley: May it please the Court, that is irrelevant whether he was or not. It doesn't go to his credibility. It is not part, was not part of his direct examination. It is wholly collateral.

The Court: I will sustain the objection. If there is any specific matter you wish to ask him about, you may do so.

Mr. Witt: I think we made a sufficient record in Chambers on this your Honor. I will proceed to ask my questions and, then your Honor will make his rulings if Mr. Kelley objects, and we will save time I think that way.

The Court: All right.

[fol. 936] Q. Mr. Mason, do you recall that on September 3, 1938, you were interrogated in Helena, Montana, by Harold Wetherer, Immigrant Inspector, about your membership in the Communist Party in the early '30's?

A. I recall being asked some questions. However, I do not recall the time nor do I recall at all that such questions were asked in Helena. I believe they were asked in Butte.

Q. I am coming to that, Mr. Mason, but since you mention that, maybe we will get that out of the way. On this occasion in Butte which you recall, was that on February 12, 1952, when you were interrogated by Officer-in-Charge Keifer L. Gray and you were asked questions about—

The Court: Ask him, read him the question you have in mind and ask him if he made that answer, not your synopsis of what he is testifying about.

Mr. Witt: I am just asking him, no synopsis, this is a long thing. I just asked him about the membership in the Communist Party which I can ask him about.

The Court: That is your assumption. I do not know the purpose. You can ask him any specific question and then whether he made that answer, and then we will determine whether the thing is properly admissible.

Q. Do you recall, Mr. Mason, being asked by Mr. Gray in Butte, Montana, on February 12, 1952, the following question: "Approximately when and where did you join the Communist Party?" And giving the following answer: "It was in the crash of 1929, possibly 1930. I have difficulty remembering dates. I know I joined the Miners Union, and I have some difficulty in even recalling the type of organization I actually joined."

Mr. Vincent: If the Court please, the Government objects to that.

The Court: I do not think the question need be answered until we get this disposed of. There is nothing inconsistent in that as I understand the testimony now. What is the purpose of that?

Mr. Witt: I thought we had made it clear in Chambers, apparently we didn't, and I have difficulty continuing this [fol. 937] examination, and I think it is very confusing for the Jury. May I suggest that we take a short recess and go into Chambers? I will try, if you will just bear with me or go into Chambers without a recess, I will try to explain to the Court the purpose of the rest of my examination of this witness.

The Court: I am not asking about that. I am asking about the relevancy of this question and for what purpose it is offered.

Mr. Witt: Well, I do not think I should answer that question in the hearing of the witness. I respectfully request then that the witness be excused, be asked to step out of the courtroom, because, if I answer that question, I am being required to tell the witness what I am interested in and preparing him to give his own answers.

In Chambers

The Court: What is it now, Mr. Witt?

Mr. Witt: What I am now trying to show by the witness is that in 1938 before he was naturalized he was interrogated by the Immigration Service about his past membership in the Communist Party, that is what I started on, and he said he didn't remember. That was the interrogation I referred to in Helena. Then with respect to the pending question I want to show that in February, 1952, he was interrogated again by the Immigration Service in Butte and gave a sworn statement on that occasion about his past membership in the Communist Party.

In addition, I want to show that the witness knew that Congress in 1950 between these two events, the one in '38 and the one in '52, the witness knew in 1950 Congress passed the McCarran Act which among other provisions had provisions providing for the deportation of aliens on the ground of their past membership in the Communist Party. That provision was sustained by the Supreme Court in Galvan vs. Press. I want to show also that the witness knows that the immigration laws provide for denaturalization of naturalized citizens who secured their naturalization by fraud and that the witness knows that there are cases, many of them receiving wide publicity, in which the Government is trying to show that, if an alien who at the time or in the past had been a member of the Communist Party gets [fol. 938] himself naturalized, then he is subject to denaturalization. The result of the witness's knowledge of this legal situation which he knew as a layman like many other laymen knew, the witness knew in February, 1952, on the occasion on which he was interrogated by the Immigration Service the second time that he was subject first to denaturalization and after that had been accomplished by the Government he was subject to deportation.

Then I want to show as a result of that situation and the promises and-or threats which were held out to him by Government Agents in connection with it that he thereafter after February 12, 1952, became an informant for the FBI and performed his functions as such at least into 1956 according to the record we have.

The Court: What do you think makes it relevant in this cross examination?

Mr. Witt: Well, my understanding is, I could be wrong, but I don't think I am, that on cross examination you can show the interest of the witness in testifying in the same way you can show that the Government has paid him cold cash, that is always relevant, I don't think there is any dispute about it, Mr. Kelley didn't even object to these questions about payments to him by the FBI, and we can show that the Government paid him in some other form, often as in this case something more valuable than cash.

The Court: What do you think about it, Mr. Kelley?

Mr. Kelley: May it please the Court, I think this falls squarely within that case that I read to you the other day about going into anything for the purpose of merely trying to embarrass a witness. It would be like going into his marital problems or something like that if he had them. This is not a deportation or a denaturalization case, and those issues might have some relevancy there. In both of these statements he has admitted belonging to the Communist Party, and, so, there is nothing inconsistent with his testimony on direct, and in these statements, and that is the purpose of using prior testimony, is to show an inconsistency with his testimony on direct.

[fol. 939] Now, Mr. Witt has also assumed because this Exhibit P, which is the 1938 testimony, says "investigation conducted by the Helena Office on September 2, 1938" that the investigation was conducted in Helena. The witness said he remembered it as being in Butte. So, he assumes immediately because it says by the Helena Office that the witness is mistaken about that. But in both of these statements he admitted he belonged to the Communist Party, and it is not inconsistent, and it is going off on a matter that is wholly collateral and only for the purpose of trying to embarrass the witness if anybody could come to the conclusion Mr. Witt has from these two documents.

It is a statement about his becoming an informer, and the Government holding this over his head, that is all a figment of his imagination. He cannot prove any of it. But he makes those statements for the record and proceeds.

The Court: I want to inquire about one thing. I am asking you as a member of the Bar of this Court and as a member of the Bar. You testified about threats and coercion. Is there any testimony that you know of that will substantiate that charge?

Mr. Witt: Yes, sir. Let me answer it this way: In the first place, I didn't testify, if the Court please.

The Court: No, you didn't testify, but you just stated in what you were talking about—

Mr. Witt: Let me tell you what I didn't say, I will be glad to as a member of the bar, and I am very conscious of that problem in conducting my examination. I know for a fact both as general counsel to Mine-Mill and from my talks with people in the union during all these years that during the period I am talking about, during the McCarran Act period and particularly during the period before the fight in the union began in August, 1953, which would be after February, 1952, Mr. Mason was going around asking people questions about his status as an alien.

I want to say for the record he never, your Honor, I just want to finish my statement in view of the way your Honor put the question, it is important for me to state for the [fol. 940] record that Mr. Mason never asked me about it either as general counsel for the Union just off the cuff or in any capacity as a lawyer, but I have been advised by several people in the union that Mason raised that question. So, that is why I am interested in pursuing it.

The Court: That only turns, that doesn't touch what I am asking. You in what you said you intended to establish left definitely the impression that some officer of the Government or some Agent of the Government had threatened him with deportation or with some denaturalization proceeding or refusal of his citizenship or something if he didn't go along in effect with this particular series of investigations and testify for the Government. Now, I wondered what that is based on.

Mr. Witt: That is based on these two aspects of it, your Honor, that I have tried to state: One, the circumstantial evidence from these—

The Court: That doesn't—I mean there is a reason you say there were threats and was a positive arrangement between officers of the Government that they would not denaturalize him in effect or proceed against him in respect to his citizenship if he would go along and testify for the Government in the cases. Is that based on implication or deduction or do you know of any fact to support it?

Mr. Witt: No, sir. Your Honor, so this record will be very clear on this point, I am aware of the rule that is binding on counsel. In fact, I discussed with Mr. Deikman and Mr. Travis at luncheon in this very connection about counsel's having to support a question which has to do with a witness's prior testimony. In other words, the illustration I gave to Mr. Travis in explaining this problem to him and explaining what has already happened in the trial was that you could not as a foundation question to the witness say to him, "Isn't it true that on such and such a date you gave such and such testimony," unless you as counsel knew he had, and you could exhibit it to him if he answered "no" for purposes of impeachment.

This kind of material is not in that category. I am not saying there is testimony, to use the word that is important here and the word that your Honor used in this question; what I am saying in the light of my initial statement here [fol. 941] on this problem is that the circumstantial evidence having to do with the dates, particularly the passage of the McCarran Act in 1950, this man's interrogation by the Immigration Service in 1952, the fact that the evidence in this case discloses that in August, 1953, if not earlier he was an informant for the FBI, that is circumstantial evidence which leads me to believe that it may be true that the Government used this kind of pressure on him plus the other thing I said that I had been advised that during the critical period in question Mr. Mason was very, very concerned with that problem.

The Court: I do not think the inference is warranted, the inference there were threats or there was any deal made or anything, however you wish to designate it in what you

have just stated, and except for that I am convinced that the evidence is entirely irrelevant. So, the Government I assume objects or did object.

Mr. Kelley: Yes, we did.

The Court: The objection of the Government to this line of testimony may be upheld.

Mr. Witt: May I say this so the record will be clear on it, your Honor?

The Court: Yes.

Mr. Witt: Mr. Kelley said the witness was being asked these questions only for the purpose of embarrassing him. It could be true that otherwise I would not mind the witness being embarrassed, but that has nothing to do with this line. The purpose of this line is, as I have explained to the Court. Number two, I am not rearguing it, your Honor has ruled, but I do want to say in terms of my understanding of the law that at this point I am not asking that your Honor agree with my interpretation of this circumstantial evidence. I don't think your Honor has to agree. Your Honor can be in violent disagreement. All I am saying is that there is enough here to justify inquiring of the witness as to this matter.

The Court: The Court feels there is not. So, the objection will be sustained to this type of testimony.

[fol. 942] Mr. Witt: Now, in light of that I wonder whether your Honor would permit me to ask him two or three other questions on this line, and Mr. Kelley I understand will object, and I understand your Honor will sustain the objections, because I think I would like at least the record to be clear as to these objective facts which this witness can testify to, and I think I should be permitted to ask him. Mr. Kelley may be right in saying that I confused this witness about Helena and Butte, but that is not important. We can clear that up. I want to get from the witness whether he was interrogated on two occasions by the Immigration Service about his past membership, one in '38 and one—

The Court: What is the relevancy of that?

Mr. Witt: In order to, if Mr. Kelley will now stipulate that, I won't have to ask the witness.

The Court: What is the relevancy if he stipulates to it?

Mr. Witt: Relevancy not in terms of testimony but in terms of the record I would like to have on this issue. But I have made it clear.

The Court: I want to know what makes it relevant even if they stipulate to it. What if he did, what is the relevancy?

Mr. Witt: Those are foundation questions I wanted to get to on what your Honor has sustained the objection. I think the record is clear enough, and I will drop it.

The Court: All right.

Mr. Witt: If the Court please, I intend to ask this man the same line of questions about his association with a union rival to Mine-Mill as I proposed to put to the prior witnesses.

The Court: I will sustain the objection to those if the situation is the same as in these other two cases.

Mr. Witt: But I will get into that in open Court, and your Honor will rule.

The Court: Yes.

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[fol. 943] **After Recess**

In Open Court

William Mason, resumed the stand, and testified as follows:

Cross Examination.

By Mr. Witt (Continued):

Q. Mr. Mason, when was it that you left Mine-Mill?

A. In December of 1953.

Q. At that time did you become employed by another labor organization?

A. Yes, shortly thereafter.

Q. About when? You say shortly thereafter. December or January of '54?

A. I was employed January, February, and March of '54.

Q. Isn't it true that in March of 1954 the National Labor Relations Board conducted an election among the employees

of the Anaconda Company in Montana to see whether those employees wanted to be represented by Mine-Mill or the United Steel workers of America?

Mr. Vincent: The Government objects to that. It doesn't seem to be relevant to this.

[fol. 944] The Court: I assume it is a preliminary question. You may answer, Mr. Mason.

A. There was such a National Labor Relations Board conducted election, yes.

Q. That was in March of '54, wasn't it?

A. Yes.

Q. Did you continue to work for United Steelworkers of America from January until after that election? Isn't that right?

A. The election was extremely late in the month of March. My connection with the United Steelworkers of America ceased at the end of March.

Q. Mine-Mill won that election among the workers in Montana, didn't it?

A. Yes, with the help of the corporations.

Q. Which corporations?

A. The copper companies in the industry. It is practically a company union ever since.

Q. Was Travis Secretary-Treasurer of Mine-Mill at the time?

A. Pardon?

Q. Was Travis Secretary-Treasury of Mine-Mill at that time?

A. Yes.

Q. Then is it your testimony that the copper corporations supported Mine-Mill in that election while Travis was Secretary-Treasurer?

Mr. Kelley: May it please the Court, the Government objects.

Mr. Witt: I withdraw the question. I withdraw it.

Q. Did you on behalf of the United Steelworkers of America—Strike that, please. Mr. Mason, from your experience in the labor movement you had become familiar with NLRB procedures?

A. Somewhat.

Q. You are familiar with the fact, aren't you, that under the National Labor Relations Act, if an employer helps a union in connection with an election, the other union if it loses can file objections with the Board to have that election upset, you know that rule?

Mr. Kelley: I object to that, your Honor.

The Court: I will sustain the objection. I think that is purely collateral.

Mr. Witt: The witness opened it up, your Honor.

[fol. 945] The Court: I say I will sustain the objection.

Q. Mr. Mason, after you stopped working for the Steelworkers did you continue to talk in Butte against Travis and Mine-Mill?

Mr. Vincent: If your Honor please, the Government objects to that question.

The Court: I didn't hear the question.

(The reporter read the last question.)

The Court: I think you may answer the question. The objection will be overruled.

A. I continued to expose Communist control of Mine-Mill.

Q. And then in continuing to expose Communist control of Mine-Mill you continued to talk against Mr. Travis, right?

A. Not particularly except as one of the Communists in control of Mine-Mill.

Q. After your association—strike that, please. What was your salary with the United Steelworkers of America while you were with them?

Mr. Kelley: The Government objects to that as irrelevant.

The Court: I will sustain the objection.

Q. What was the per-diem you received from the Steelworkers while you were with them?

Mr. Kelley: Same objection.

The Court: I will sustain the objection.

Q. Was your salary with the Steelworkers more than your salary as Executive Board member of Mine-Mill?

Mr. Kelley: Same objection.

The Court: I will sustain the objection.

Q. Was your per-diem with the Steelworkers higher than the per-diem while you were Executive Board member of Mine-Mill?

[fol. 946] Mr. Kelley: Same objection.

The Court: I will sustain the objection.

Q. After your association with the Steelworkers Union came to an end, Mr. Mason, did you become associated with or become employed by any other union?

A. No.

Q. Did you have any connection with a group in Butte which worked against Travis and Mine-Mill?

A. I supported the Miners Action Committee, a rank and file group devoted to freeing the Butte Union from the Communist-dominated Mine-Mill.

Q. That is after March of '54 when the rank and file miners in Butte rejected you and—

Mr. Kelley: That is argumentative.

The Court: I do not think that summary is warranted. He has answered the question, Mr. Witt.

Q. Mr. Mason, did you organize the Miners Action Committee?

A. I helped to organize it, yes.

Q. You and your brother, Joe?

A. My brother, Joe, assisted also in organizing it.

Q. That is the same brother Joe for whom you are working now?

A. Yes. I would like to explain my answer here.

Q. Go ahead.

A. Because that question has been asked and not answered. The organization of this committee took place not immediately after the NLRB election, and I was not personally rejected by the miners and smelter workers. I think you drop both of those hints in the question that I was not allowed to answer.

Q. I was going to ask you next, Mr. Mason, whether you recall when the Miners Action Committee was organized.

A. No, offhand, I do not recall. I would say it was a period of several months after the NLRB election, perhaps nearly a year. I cannot recall.

Q. And did the Miners Action Committee put out literature attacking Travis and Mine-Mill?

A. The Miners Action Committee put out literature exposing the Communist control of Mine-Mill. No question but that in its literature or in its handbills the name of Travis came up more than once.

[fol. 947] Q. Is the Miners Action Committee still in existence?

A. Yes.

Q. Is it still attacking Mine-Mill?

A. It is still exposing Communist control of Mine-Mill.

Q. To your knowledge is Travis presently connected with Mine-Mill in any way?

A. Pardon? I didn't get the question.

Mr. Witt: The reporter will please read the question.

(The reporter read the last question.)

A. I understand he is receiving some money from the union, but I am not familiar with the details surrounding this question.

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[fol. 951] WILLIAM MASON, a witness called on behalf of the Defendant, testified:

Direct Examination.

By Mr. Witt:

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[fol. 955] Mr. Witt: We pass the witness.

The Court: Is there any cross examination?

Mr. Kelley: No cross examination, your Honor.

The Court: All right. I think the Government said there was no redirect examination when he was your witness.

Mr. Kelley: That's right, your Honor.

In Chambers

The Court: I think you had better let the record show what request you intend to support by this witness. I think the record ought to show preliminary to his examination in support of what request that you are taking his testimony.

Mr. Witt: We are taking his testimony in support of our motion for statements under Section 3500 to determine whether we have been furnished everything under 3500 to which we are entitled, number one, and, number two, also to lay a foundation for a renewal of the motion for the production of his grand jury testimony in this Court in 1954 and 1956.

[fol. 956] William Mason, a witness called on behalf of the Government, testified:

Examination by Mr. Witt:

Q. Mr. Mason, were you ever interrogated by a person representing the Immigration Service about Mr. Travis?

A. No, not that I recall.

Q. Before you testified in the NLRB proceeding in May, 1954, did you have any talks about the testimony you would give in that proceeding with any person representing the NLRB?

A. There was some discussion with Mr. Foley who was the representative of the NLRB. He asked me some questions, and I gave him some answers. I don't recall what was specifically said by either myself or Mr. Foley, but it had to do with my knowledge of what the hearing is all about and questions concerning compliance with the Union and the Union's newspaper, whether it is received by members, et cetera. I can't recall it in detail.

Q. Is that the same Mr. Foley who was counsel for the Board in the open hearing in May of 1954?

Mr. Vincent: Would you repeat that, please? I didn't catch that question.

A. Yes.

Q. On how many occasions did you talk to Mr. Foley?

A. I think only on one occasion before the hearing. I do not recall whether he called me concerning an affidavit or not or whether he had written to me about it, but there was some contact with him concerning the affidavit.

Q. Well, perhaps I should have asked you, did you see Mr. Foley face to face before you took the witness stand in that hearing?

A. Yes.

Q. And do you recall when that was or about when?

A. I seem to recall it was the night before the hearing commenced.

Q. So that conversation with Mr. Foley took place in Washington, D.C.?

A. Yes.

Q. Where did it take place in Washington?

A. I believe in my hotel room. I am not too sure about that. It may have been in someone else's hotel room. I believe the hotel is the Raleigh.

Q. At the Annapolis?

[fol. 957] Mr. Kelley: The Raleigh.

Q. You used to stay at the Annapolis, didn't you, Mr. Mason?

A. Yes, it is one of my favorite hotels.

Q. About how much time did you spend with Mr. Foley at the Raleigh on that occasion?

A. I do not recall.

Q. Approximately? Was it one hour or five hours, 10 hours, five minutes?

A. It was not five hours. It may have been less than one or more than one hour.

Q. Now, on that occasion did you tell Mr. Foley about your conversation with Travis?

The Court: Let's see, first, Mr. Witt, I think we simplified it the other day, let's see if there would be anything that would some into the category of statements and get into the relevancy then.

Mr. Witt: I am sorry. I haven't been brought up to date in the improvement of the procedure.

The Court: I altered it, and Mr. Deikman followed it.

Q. On this occasion did you talk to Mr. Foley about Mr. Travis?

The Court: No.

Mr. Witt: I think I understand.

Q. On this occasion did you give Mr. Foley anything in writing?

A. Not on that occasion. However, I gave him an affidavit if I recall correctly that had been mailed to him by me from Butte.

Q. By that, Mr. Mason, you mean that prior to this session with Mr. Foley at the Raleigh you had mailed them an affidavit from Butte, is that it?

A. That is my recollection. I would like to add that it is the signing of that affidavit—

Q. I am not asking you that. I will get back to that, Mr. Mason. It is confusing.

A. I had something else in mind.

Q. Go ahead. I don't want to stop you.

The Court: Go ahead with questions, because one thing, the witness may not know that I think he is entitled to know, that I assume that the affidavit he is talking about [fol. 958] has already been turned over or furnished to the defense.

Mr. Witt: I don't think he should be told that.

Mr. Kelley: Yes.

Mr. Witt: I object to that. I will get to the affidavit, but I think we are entitled to do it in our own way.

The Court: You can go ahead with this matter now.

Q. I am still talking about the session with Mr. Foley at the Hotel Raleigh, Mr. Mason. In that session did you, coming back to the question I asked you, did you furnish Mr. Foley with anything in writing?

Mr. Kelley: It has already been asked and answered.

Mr. Witt: I am sorry.

Q. On that occasion did Mr. Foley ask you questions and did you make answers to his questions?

A. Yes, there were some questions asked.

Q. And did Mr. Foley make notes of what you told him?

A. I think he took some notes.

Q. Before you took the witness stand in the open hearing before the Examiner of the NLRB did Mr. Foley show you anything in writing based on his discussions with you?

A. I don't recall anything.

Q. Now, Mr. Mason, going back to what you said about having sent Mr. Foley an affidavit before you met him in Washington at the Hotel Raleigh about when was that that you sent him that affidavit?

A. I cannot recall the date, but it was during the heat of the campaign between the Mine-Mill and the United Steelworkers. I wanted to say a moment ago that I did not realize that the signing of the affidavit would place me on the witness chair or perhaps I would not have signed it. Subsequently, that action was responsible for me being a witness in other matters. I signed the affidavit in the heat of the campaign, and I believe I mailed it to Mr. Foley at Washington.

Q. Who asked you to sign that affidavit, Mr. Mason?

Mr. Kelley: May it please the Court, there is no point of going into that, because it has already been produced.

[fol. 959] The Court: I don't see any point, Mr. Witt, because they furnished the affidavit.

Mr. Witt: Well, your Honor, again, I do not think it is fair to us to say it in the presence of the witness, but I don't think it matters too much. May I say what I am trying to do? I am not going into the affidavit. I want to ask if other events took place at that time.

The Court: If it is something along that line, maybe it is proper. The reason I think it is proper to tell the witness and to leave the affidavit out of this proceeding, this proceeding is actually limited to something that hasn't been produced.

Mr. Witt: I understand that, and that wasn't in my mind when I asked this question. I wasn't going into the affidavit we have here. I will be glad so there is no question to say to Mr. Mason that we have a copy of that affidavit. I don't intend to ask any questions about it.

Q. I will come back to the question I was asking you, who was it, who asked you for that affidavit?

A. If I recall correctly, the affidavit was sent to me by

Mr. Foley with an accompanying letter asking me to sign it. I am not too clear on this, however. There may have been a request to sign it made of me by Mr. Foley or a telephone call. I can't recall. We were in the heat of the campaign, and all I know is I got the affidavit, signed it, and I am very certain I mailed it to Mr. Foley.

Q. Then, do I gather that you didn't see Mr. Foley before you met him in Washington at the Hotel Raleigh and that your only contact with him was probably over the phone when he told you that he would prepare an affidavit and send it to you, is that about it?

A. I don't recall having seen Mr. Foley before I met him in Washington.

Q. Aside from Mr. Foley did anybody else talk to you before you took the witness stand in the hearing before the NLRB about the testimony you would give?

A. I don't recall that there was any other discussions with anyone with the possible exception of with a fellow anti-Communist who came to Washington with me from Montana, Charles McLane. There may have been some discussion with him. I can't recall.

[fol. 960] Q. Before you signed the affidavit did you talk to any other agent of the Government about the NLRB proceeding or the affidavit?

A. Not that I recall. I believe the only one I had occasion to talk to about it was the attorney that notarized the affidavit.

Q. Emigh?

A. Emigh.

Q. He was one of the attorneys then representing the United Steelworkers of America?

A. Yes, I believe he did some work for the Steelworkers.

Q. Well, specifically, before you signed the affidavit did you discuss the matter with Tom Zoeller of the FBI?

A. I would say, no, I cannot recall any discussion with Tom Zoeller with reference to this matter.

Q. Did you discuss it with any other FBI Agent?

The Court: We are talking about this affidavit?

Mr. Witt: I want to see if we can get into other material we are entitled to.

The Court: I haven't heard any question.

Mr. Witt: I am referring to the affidavit just to place it in time, but I am not getting into the affidavit.

A. No, I don't know any other FBI Agent.

Q. Mr. Mason, before you took the witness stand against Travis on the first trial did you talk to any Agent of the Department of Justice about the testimony you would give against Travis in that trial?

The Court: Well, that covers everything. You have been over that on the witness stand. You mean on the occasions of his coming here?

Mr. Witt: Yes. I don't think I asked him about that in open court.

Mr. Kelley: You used the word "agent".

The Court: Your question was, did he ever before he testified in the Travis trial, did he talk to anybody. He has been over that. Did you mean that did he talk to anybody here on the occasion of his testifying?

[fol. 961] Q. Did you hear what the judge said, Mr. Mason?

A. I would rather the question was repeated.

Q. After you got to Denver in connection with your being a witness against Travis on his first trial and before you took the witness stand did you talk to any agent of the Department of Justice about your testimony?

A. Yes. There was some questions and answers. I can't recall it. As a matter of fact, there have been a number of these things, and I cannot recall who the representatives were.

Q. I was going to ask you that next. Then you don't recall who was who from the Department of Justice you talked to in Denver?

A. It may have been Mr. Mitchell, perhaps even a word or two with the District Attorney, but I am not sure.

Q. Mr. Mason, you are probably getting tired like the rest of us, but will you try to keep your voice up a little? Was it Mr. Swanson, an Assistant United States Attorney here?

A. Yes, I remember Mr. Swanson.

Q. Did you talk to him?

A. I cannot recall that I did.

Q. Did you talk to any FBI Agent about your testimony before you took the stand?

A. No, not about testimony.

Q. Do you recall how many talks you had with the attorney even though you can't recall exactly which attorneys—

Mr. Kelley: May it please the Court, we object to this line of questioning. It wouldn't make any difference how much he talked to them, whatever they got would be work product.

The Court: Let him answer if he recalls. It is preliminary.

A. I can't recall. There may have been a lunch or two or maybe a dinner, maybe an exchange of information concerning weather. I am not sure what is meant by the question.

Q. Well, I am asking you about talking to the attorneys about Travis in preparation for your taking the witness stand.

Mr. Kelley: Mr. Witt, I object to that type of question. Why not ask him if we took any statement and submitted it to him, he signed any, or something like that?

Mr. Witt: I don't think it is right. I don't agree with you.

The Court: Well, proceed. He has answered the qu stion.

[fol. 962] Q. Mr. Mason, in connection with the talks you had with the attorneys, you know who I am talking about, the talks in Denver about the Travis case, do you remember any of the attorneys taking notes when you talked to them?

A. Yes, these attorneys are always taking some kind of notes. I believe they did at that period too. I cannot recall. I can't recall the actual incident of taking actual notes.

Q. On any of those occasions did you give any of the attorneys anything in writing pertaining to the testimony you were going to give against Travis?

A. Not that I recall. I did, however, on some occasions,

and I cannot remember at which of these proceedings this was, perhaps gave them a copy of the constitution of the union, and, if I am not mistaken, somebody some place has a couple of copies of the proceedings in Mine-Mill Convention that are my property which I hope to get it back. I cannot recall on which occasion.

Q. Do you recall giving any of these attorneys, I am still talking about the same period when you were in Denver before you took the witness stand in the first trial, do you remember giving them copies of minutes of Mine-Mill Executive Board meetings?

Mr. Vincent: If your Honor please, even if he did, it would not be a statement of this witness.

The Court: I think I will sustain the objection to that.

Q. Do you recall whether after you talked to any of these attorneys they showed you anything in writing based on your talks with them?

A. No, I recall of no such thing.

Q. Do you recall whether after you talked to these attorneys that you signed any document that was prepared by the attorneys?

A. No.

Q. You didn't sign any affidavit?

A. No.

Q. Mr. Mason, I think you testified in open court that you appeared before the grand jury here in 1954 before Travis was indicted, is that right?

A. I don't recall whether I answered it or whether there was an objection from the Government attorneys, but I did testify before the grand jury.

Q. Before you went before the grand jury did you talk to any attorneys representing the Government here in Denver about the testimony you would give before the grand jury?

A. Yes. I met someone I am sure before appearing before the grand jury. I am somewhat confused as to who was [fol. 963] at which of these proceedings. That is why I cannot answer as to names.

Q. Well, just to see to refresh your recollection was it Mr. Kelley?

A. Mr. Kelley was there, yes.

Q. Was Mr. Mitchell one of them?

A. That I am not sure.

Q. Mr. Swanson?

A. Mr. Swanson I believe was there.

Q. How many talks did you have with the attorneys on that occasion?

A. I can't recall. The talks weren't always about the subject for which I came to Denver. They were social discussions.

Q. I assumed we understood each other, but, just to make it clear, I was asking about how many talks you had about Travis or about the testimony you were to give before the grand jury.

A. I cannot recall.

Q. Can you recall whether any of the attorneys made notes on any of these occasions?

A. I can't recall. They probably did.

Q. Can you recall whether on any of these occasions any of the attorneys showed you anything in writing based on their talks with you about Travis and the testimony you were to give before the grand jury?

A. I believe not.

Q. Then you don't recall signing anything prepared by any of the attorneys?

A. No.

Q. Was any stenographer present on any of these occasions when you talked to the attorneys prior to your going before the grand jury in 1954?

A. No.

Q. On any of these occasions did you give any of the attorneys anything in writing about Mr. Travis?

A. I already answered that question. Somewhere down the line I lost a constitution and a couple of convention proceedings. I cannot recall—

Q. Did you also testify before a grand jury in this court—

In Chambers

The Court: I think Mr. Witt was starting to interrogate about the grand jury here and then starting on another grand jury.

Mr. Kelley: Yes.

WILLIAM MASON, testified as follows:

Examination.

By Mr. Deikman:

Q. Did you have occasion, Mr. Mason, to appear before a grand jury in Denver in 1956?

A. Yes.

[fol. 964] Q. And did you speak to any attorneys at that time for the Government?

A. Yes.

Q. What attorneys were those?

A. I am not sure as to who they were. I very likely spoke to Mr. Kelley.

Q. Would it refresh your recollection to mention the name of Mr. Broome?

A. Yes. I met Mr. Broome in Denver, but I don't recall on which occasion.

Q. You are not sure it was this occasion that you are speaking of right now?

A. No, I am not sure of that.

Q. Would it refresh your recollection in regard to just previous to your appearance before the grand jury in Denver in 1956 to mention the name of Mr. Heflin?

A. Yes, I met Mr. Heflin too.

Q. And would it refresh your recollection to mention the name of Mr. Saar?

A. No, I don't recall meeting a Mr. Saar.

Q. Would it refresh your recollection to mention the name of Thomas Mitchell?

A. Yes, I met Tom on a couple of occasions.

Mr. Kelley: He is referring to before this grand jury.

A. I am not sure.

The Court: Nineteen fifty-six.

Mr. Deikman: Yes.

A. I am not sure on which occasion I met these people.

Q. You are not sure whether you met Mr. Mitchell before the grand jury in 1954 in Denver or the grand jury in 1956 in Denver?

A. Or the original trial. There are three occasions for me to visit here, and I met these people and can't place the occasion.

Q. Did you have occasion just previous to your appearance before the grand jury in Denver in 1956 to spend more time discussing your testimony before that jury with one attorney more than any other?

A. I would say that it is quite possible. I don't recall. I talked to a number of people.

Q. Do you recall how many times during that period that you talked to Mr. Kelley?

A. No, I would have to make a guess at it.

Q. Would you make an estimate?

A. Oh, I would say—you were asking me with respect to discussing the subject of the grand jury or—

[fol. 965] Q. The subject of your testimony before the grand jury at that time.

A. I would say once or twice.

Q. That is with Mr. Kelley?

A. Yes.

Q. And how long was your conversation at that time on the one or two occasions?

A. Probably brief conversations between sessions, lunch periods or something like that. I do not recall any formal discussion that has to do with the subject I was in Denver for at that particular moment. I don't recall any such formal discussion with Mr. Kelley.

Q. Do you recall how many times you talked to Mr. Broome?

The Court: He hasn't said he talked to him at all. He said he remembered meeting him. Ask him if he talked to anyone else about his testimony.

Q. Did you talk to anyone else about your testimony?

The Court: Any other lawyer.

Q. Any other attorney for the Government?

A. With respect to testifying—

The Court: This 1956 grand jury.

A. I probably did. I don't recall.

Q. Would it refresh your recollection to ask you whether you talked to Mr. Broome about your testimony?

A. I can't recall talking to him. I recall only meeting him on at least one occasion here in Denver, but I don't know which.

Q. Aside from Mr. Kelley on that occasion can you estimate how many hours you spent speaking to other attorneys concerning your testimony?

A. No, I can't. I work for a living. I don't live these cases or go to sleep with them. I come down here to Denver, and Government attorneys ask a question or two, and I answer, and that is it. I am not that interested in these proceedings that I should compute the number of hours spent in discussing anything involved in them.

Q. Can you recall whether Mr. Kelley or any other attorney at that time took notes relative to your conversations at that time or during your conversations at that time?

A. No, I can't, but there were times that some of these people took notes, nothing that I saw or nothing that I can say is an account of anything I said.

[fol. 966] Q. During the conversations that you had during this period, and still speaking of just before the grand jury in 1956, did you observe the presence of any stenographer?

A. Did I what?

Q. Did you observe the presence of any stenographer during your conversations?

A. I don't know.

Q. During that time did you submit anything in writing to the attorneys for the Government?

A. Did I submit anything in writing?

Q. Yes, sir.

A. No.

Q. Have you had occasion to appear before any other grand juries besides the ones that we have already mentioned and about which you have testified which grand juries elicited your testimony in regard to any violations similar to the Taft-Hartley Act, Smith Act, or anything in that area?

Mr. Kelley: The Government objects to that as incompetent going into what was considered before a grand jury, any grand jury. If he wants to ask if he attended, went to some place for the purpose of giving testimony, that is one thing, but asking him if he testified before a grand jury as to a certain matter is improper.

The Court: I am inclined to think that's right, but I think what Mr. Deikman's question was was before any grand jury in which that matter was involved, and that was with respect to what he testified to.

Mr. Kelley: If he goes into Smith Act and so forth, that is irrelevant too.

The Court: Let's find out what the fact is, whether he testified before any other grand juries that were investigating any of these matters, not with respect to what his testimony was. Did you appear before any other grand jury that involved any of these matters?

The Witness: Besides the two?

The Court: Besides the two here in Denver.

The Witness: No.

Mr. Deikman: Just in respect to that, your Honor, I [fol. 967] would appreciate it if Mr. Kelley's or the Government's objections were consistent, because the last time I asked a similar question they objected on the grounds this might have been a grand jury in relation to anything, so, I had to more or less define the area in which the grand jury was investigating.

The Court: He has answered the question.

Mr. Deikman: If Mr. Kelley will permit me to ask this question—

Q. Do you recall testifying before any other open court proceedings in the nature of a criminal trial other than the ones you have already mentioned?

The Court: Well, I don't think that is a proper question. As I pointed out the other day, that comes back to what we were talking about a minute ago. He may have testified in a police court case up in Butte, Montana, about something entirely detached. That covers all criminal cases.

Mr. Deikman: That is why I would like to add to that question concerning—

The Court: I do not think there is any point to that. I will sustain the objection. There wasn't one.

Mr. Kelley: I permitted him to answer that, your Honor.

Mr. Deikman: Well, in view of the Court having made the objection I will rephrase the question.

Q. Do you recall having testified in any other criminal proceedings in open court other than the ones you have already testified involving violations of Taft-Hartley Act, Smith Act, or anything in that area where your experiences with Communists would be relevant?

Mr. Vincent: The Government objects to that, your Honor.

The Court: Well, I think I will let him answer it. Technically, I think the objection is good, but I think to expedite matter. I will let him answer it.

[fol. 968] A. No.

Q. Do you recall having been interviewed on August 7, 1953, by Mr. Zoeller?

Mr. Deikman: I do not know whether that appears already in the record or not.

The Court: It does very definitely.

Mr. Crandall: It does.

Mr. Kelley: It has been gone into extensively.

Mr. Deikman: I want to apologize for that. We didn't get the transcript until early this morning.

The Court: I think that was part of the statement introduced in evidence to fix the date, wasn't it?

Mr. Deikman: Well, the date of the statement is August 10, 1953, and I am asking about August 7, 1953.

The Court: That is the date of the interview. That is covered by the August 10 report. You can look at the record if you want to.

Mr. Kelley: That is Exhibit R.

The Court: It is easy to find.

Mr. Deikman: I am sure it was gone into now that I have had an opportunity to reflect on it. That is probably on page 1501.

The Court: It is on page 1501.

Q. On August 7, 1953, did Mr. Zoeller take any notes of your conversation with him?

Mr. Kelley: I object to that as having been gone into, and the report is in evidence on that.

The Court: I thought it had been.

Mr. Kelley: On that interview.

[fol. 969] Mr. Deikman: I do not believe that question was asked, your Honor.

Mr. Kelley: That question was not asked, but you have been into this subject matter.

Mr. Deikman: We are going into a different sort—

The Court: I thought it had been gone into.

Mr. Vincent: We haven't established there has been a conversation yet.

The Court: That is in the other record. That is on page 1501. It says, "Did you have a conversation?" And he says, yes, he did. What he is asking is if he remembers there were any notes made on that occasion by Mr. Zoeller.

A. I don't remember. I take it for granted, however, that he did.

The Court: What is the point to that, because the statement was furnished, wasn't it?

Mr. Vincent: Yes, sir.

The Court: So, I don't think we need to pursue that.

Mr. Deikman: May I explain the point, your Honor?

The Court: All right.

Mr. Deikman: This statement is dated, of course, August 10 stating that William Mason orally advised about certain matters on August 7, 1953. Now, obviously, the August 10 report is based upon an interview and possibly other notes which may fall within Section 3500 other than Defendant's Exhibit R.

The Court: I do not think that assumption is sound at all, because the Government has furnished the report which apparently was made on August 10 of the conversation with the witness and Mr. Zoeller on the 7th.

[fol. 970] Mr. Kelley: How would this witness know whether or not even if he saw him taking notes that they were in existence? He could not possibly know.

The Court: I think where there is a statement that has been furnished of a conversation, that there is no further inquiry. It would have to go to the subject matter, and that isn't pertinent.

Mr. Deikman: Just one further word on that, your Honor, at least for the record: This particular report states that as it has already been mentioned in evidence that William Mason really told Travis off including charges of Communism on the part of Travis. Now, that sentence has been considerably expanded upon in the testimony. It appears to be a very brief statement by the FBI Agent as to what Mr. Mason told him, a sort of capsule comment on something that obviously is much more lengthy, and it would seem to be logical that the FBI Agent involved would have taken more extensive notes on his own as to exactly what Mr. Mason told him in order to make that capsule comment.

The Court: How would this witness know?

Mr. Deikman: Well, he has testified that he assumes that Mr. Zoeller or whatever FBI Agent it was did take notes. Now, my next question would go into more details concerning that.

The Court: Well, he says he doesn't know. He testified, if my memory is right, if it is not, we can get it corrected quickly, he didn't know what Mr. Zoeller wrote down and didn't see his notes. Isn't that what he testified to?

The Witness: Yes. That is what it was anyhow.

Mr. Kelley: I think Mr. Deikman's statement points up the fallacy of the whole thing of permitting the cross examination from hearsay reports.

The Court: Well, I think we are past that. Furthermore, my memory is that he was interrogated in open court about what he meant by this statement and all of that within the record now.

[fol. 971] Mr. Deikman: I think there were objections to specific questions about that which were sustained by the Court.

The Court: It is easy to find out.

Mr. Deikman: In any event I do not believe we can go into exactly what he told him. As a matter of fact, on page 1506, your Honor—

The Court: He read that sentence to him, and the witness answered: "I don't recall saying anything like that. I recall it was a conversation with him concerning the situation in the Union. I do not regard," and so forth. There is another place that he was asked about the question if my memory is good. Go ahead. I don't think you need to go into this, so, I will sustain the Government's objection.

Mr. Deikman: Particularly in view of the fact that he doesn't recall having said anything like what this report says he said, I think Mr. Kelley is right, that this particular report is hearsay. It is a statement or a comment on the part of this FBI Agent.

The Court: I cannot understand, if you will tell me what the point is you are trying to get at, I could maybe understand it better. If it is what I understand it to be, I am very sure that it has no relevancy, but I do not understand. What are you trying to establish?

Mr. Deikman: It may be possible, I am not saying we can do it, it may be possible to inquire from the witness in sufficient detail to establish that on August 7 sufficient writings were made to constitute a statement under 3500. Now, Mr. Kelley said—

The Court: Ask him that. Ask him—he has already answered you that he thinks that whatever this man's name was made notes. Now, proceed from there.

Mr. Deikman: I think we will have to do that by circumstantial evidence, so, I will ask him if he can recall how long his interview with Mr. Zoeller on August 7 was.

A. I don't remember.

[fol. 972] Q. I will ask you to look at Defendant's Exhibit R and ask you if that refreshes your memory sufficiently so that you would be able to estimate the time you spent with Mr. Zoeller covering that subject matter.

Mr. Kelley: May it please the Court, it doesn't seem to me that is relevant.

The Court: You need not answer that question. He answered that he doesn't recall.

Mr. Kelley: The question is whether there were any notes he adopted as his own.

Mr. Deikman: I considered that part of the subject matter. I will drop it. I mean I considered it to be circumstantial.

Q. Did Mr. Zoeller on that occasion exhibit anything that he had prepared as a result of his conversations with you for your inspection?

A. No.

Q. Where did that conversation take place, Mr. Mason?

A. I am not sure, but I think it took place at the headquarters of the FBI in Butte.

Q. Was anyone other than Mr. Zoeller present at that time?

Mr. Kelley: The exhibit shows that there was and that was gone into.

The Court: I do not think where the report has been furnished, unless there is something that doesn't appear from the report or something, that you need to interrogate him at all.

Mr. Kelley: When I mentioned the name "Agent" in reference to it he pointed out that two agents were present, and he wanted the record to be clear on it.

Q. Did Mr. Kreitner take notes on that occasion?

A. I don't recall Kreitner being there. I assume from this discussion that he was, but part of it—

The Court: You do not recall of your independent recollection that anyone was there except Mr. Zoeller, is that right?

[fol. 973] The Witness: That's right.

The Court: Proceed.

Q. In the course of any of your conversations with the Federal Bureau of Investigation was any stenographer present?

A. No.

Q. During the course of any of your conversations with the Federal Bureau of Investigation or agents for that Agency was anyone present other than the agents who appeared to be taking stenographic or other kind of memoranda or notes?

A. No.

Mr. Deikman: Now, not going over this affidavit again, your Honor, Mr. Witt covered that, but I would just like to ask one more question concerning that affidavit.

The Court: All right, what do you mean by that?

Mr. Deikman: The affidavit provided to the National Labor Relations Board.

The Court: The National Labor Relations Board affidavit?

Mr. Deikman: Yes.

The Court: All right.

Q. Since you testified that this affidavit was sent to you through the mail—

The Court: I do not think he testified to that. He was uncertain about how he got it, but I had better let him answer, but he said he was reasonably sure that he sent it to them.

Mr. Deikman: Maybe I had better phrase the question this way.

Q. Am I correct that you said yesterday that you received a prepared affidavit through the mail?

Mr. Crandall: Objection, your Honor.

The Court: It is in the record.

[fol. 974] Mr. Kelley: It has been gone into, that affidavit, rather extensively.

Mr. Deikman: I wanted to ask another question, but I want to found it on what I believe his testimony to be that he received it through the mail.

Mr. Kelley: My recollection was that he said he got it from the attorney for the NLRB—no, not from the attorney for the NLRB but this attorney that was out in Butte for the CIO.

The Court: Let's look at the record. There is no use of arguing about it. It is all in here. You interrogated at great length about it. It starts on page 1594.

Mr. Deikman: He says, "The affidavit was sent to me by Mr. Zoeller with an accompanying letter asking me to sign it."

The Court: That is all right. Start from there. He said, "I am not too clear on this, however. There may have been

a request to sign it made of me by Mr. Foley or a telephone call. I can't recall. We were in the heat of the campaign, and all I know is I got the affidavit, signed it, and I am very certain I mailed it to Mr. Foley." That is my recollection of the testimony. So, start from there.

Q. Based on your testimony which appears at page 1597 of the transcript, "If I recall correctly, the affidavit was sent to me by Mr. Foley with an accompanying letter asking me to sign it," am I correct in interpreting that—

The Court: The answer—you need not answer the question, and you can proceed to something else. The answer is here in the record and very clear, and I will read the whole answer so that there is no mistake in the record. "If I recall correctly, the affidavit was sent to me by Mr. Foley with an accompanying letter asking me to sign it. I am not too clear on this, however. There may have been a request to sign it made of me by Mr. Foley or a telephone call. I can't recall. We were in the heat of the campaign, and all I know is I got the affidavit, signed it, and I am very certain I mailed it to Mr. Foley." That is his testimony, and we need not go back over it.

[fol. 975] Mr. Deikman: I am not trying to go back over it. I wanted to ask this question in view of that answer.

Q. In view of that answer, Mr. Mason, could you tell us how the information was obtained for the preparation of this affidavit?

Mr. Crandall: Objection, your Honor.

The Court: Well, the answer has nothing to do with it. If you want to ask him where the information in the affidavit came from, you can ask him that.

Q. Could you answer that question, Mr. Mason?

A. I am not sure I understand. I can't recall the content of the affidavit, but I seem to recall it had something to do with whether I know or do not know that the paper published by the Union is received by the membership.

The Court: The affidavit has been furnished. I do not know the point to it.

Mr. Deikman: I would like to know whether there were any reports made upon which that affidavit was based.

The Court: How would he know what somebody else prepared in an affidavit? The question should be directed to anything he discussed with somebody before the preparation of the contents or something like that.

Q. Did you discuss the contents of that affidavit with anyone before it was prepared?

A. No.

Mr. Deikman: Your Honor, may I go into some of the subjects contained in that affidavit and ask him if he had occasion to tell the FBI—

The Court: I do not see the point. The affidavit has been furnished in its entirety. If you will tell me what the point is—

Mr. Deikman: That's right, your Honor. I think that is clear from the answer the witness gave concerning that that it wasn't prepared in his presence, that it was not made [fol. 976] contemporaneously with his relation of the subject matter that is contained in that affidavit, and, therefore, I think it is logical to assume that the information was obtained on other occasions than at the time he signed it.

The Court: The affidavit is here, and he has signed it, and that is his statement. You have asked him if he conferred with anybody before it was drawn, and he said he didn't, and the statement is here with reference to—it is his own statement under the statute, and here it is. So, I do not think there is any purpose to be drawn from that.

Mr. Kelley: It is also a fair inference he had a conversation with Mr. Foley over the phone, at least he thought he did, and Mr. Foley asked him if he would sign it, that that would be a more fair assumption that Mr. Foley got the information in talking to him over the phone.

The Court: The way it stands in the record it seems more obvious to me. It has been furnished to them as this witness's signed statement.

Mr. Kelley: Right.

The Court: And that is it. That is his statement.

Mr. Deikman: Just so the record may be clear on it, I am not going to argue the point any further, but it is our position that this affidavit was not prepared in his presence. He stated that he never—

The Court: Mr. Deikman, that is so utterly ridiculous. The statute permits a statement signed by him to be admitted in evidence.

Mr. Deikman: That is not the point I am getting at.

The Court: That is the point I am getting at, and it has been indicated on that basis.

Mr. Deikman: That's right, your Honor. It is a statement under Section 3500, but we feel that the record will show that it is obvious that he must have had conversations to support that.

[fol. 977] The Court: What if he did?

Mr. Deikman: If he had conversations to support this, it is obvious that we are entitled to go into what occurred so that we can determine whether we have been provided with all the statements under Section 3500. I think the Government is taking the position that we have to be satisfied that the Government has provided us with all statements just because the statements have been provided us.

The Court: Your statement isn't supported by the record or by the facts or by this witness's testimony. So, you may proceed with something else.

Mr. Deikman: Well, your Honor, in view of the fact that I feel that all my other questions to this witness would go to the same material in regard to other statements that we have been provided, in other words, that it appears to us that we have the right—

The Court: If you will proceed to ask your questions instead of arguing, why, we will make some headway.

Mr. Deikman: I am not going to ask questions. I am going to make the record that all our questions which we feel would be proper to ask now, because we would be trespassing on the ruling—

The Court: How can the Court rule on the propriety or impropriety of other questions without having them asked? We are not going to read the record in the state of some inconceivable line of questions that you aren't going to go into in the present state of the record. So, if you have any questions, ask them.

Q. Mr. Mason, you have testified that you had a conversation with Mr. Zoeller on or about August 24 and 25, 1954. Do you recall how long those conversations lasted?

A. First, I don't recall testifying. I might have on the basis of some question said that I suppose I did meet with Mr. Zoeller, but to the best of my recollection I didn't testify that I did meet. My memory is not that good.

Q. I ask you to look at Defendant's Exhibit Q, and I will ask you whether that refreshes your recollection that you [fol. 978] did have conversations with Mr. Zoeller on or about August 24, 1955.

The Court: Was this asked in the courtroom?

Mr. Kelley: It seems to me—

Mr. Deikman: He said he didn't testify to that.

The Court: Look at the record.

Mr. Kelley: He said—you misquoted the record—he didn't recall talking to them on that date. He agreed that the document indicated he had done so, and he assumed it was correct, but that is as far as he has gone on any of these. He hasn't any independent recollection of having talked to him on any specific date. It is at the bottom of page 1494. So, let's start from there.

Q. Mr. Mason, you testified that you had a conversation with Mr. Zoeller August 24, 1955.

The Court: The answer is on 1495. The witness says: "Answer: Does it refresh my memory as to the date of the conversation? Question: Yes. Answer: No, but the date appears there, and I assume that the date is correct."

Q. Now, on that occasion, Mr. Mason, do you recall whether or not Mr. Zoeller took notes concerning your conversation?

The Court: He says he doesn't recollect the conversation. If I can read the English language, it says: "Does it refresh my memory as to the date of the conversation? Question: Yes. Answer: No, but the date appears there, and I assume that the date is correct."

Mr. Deikman: He says he doesn't remember the date of the conversation but now that we have placed the date I would like to ask him whether he recalls whether Mr. Zoeller took notes on that date concerning his conversation.

Mr. Vincent: We have a report in evidence in the record.

The Court: I think I told him to go ahead and answer the question. You may answer. Going over these categorically, the witness has testified about the general prac-
[fol. 979] tice. Answer if there were any other notes taken if you recall.

A. I don't remember, but I assume from seeing this document now that they must have taken some notes.

Q. Do you recall how long that conversation lasted?

The Court: What is the point? If the Government will object, I will sustain the objection.

Mr. Kelley: The Government objects to this whole line of questioning, because it is irrelevant.

The Court: The statement has been furnished, and the statement is in the hands of defense counsel.

Mr. Deikman: I will be satisfied with your sustaining the objection, because we will have made the record. I will ask the question, and Mr. Kelley can object, and the Court can sustain the objection, but I would like to ask the question for the record.

The Court: Proceed.

Mr. Deikman: That question has been asked and answered and the objection has been made and the objection has been sustained.

Q. Now, I will ask whether looking at this exhibit, Mr. Mason, whether your recollection is refreshed so that you would be able to say that you had a conversation also on August 25 with Mr. Zoeller.

A. In addition to this?

Q. In addition to the one on August 24.

A. I don't recall.

Q. You don't recall?

A. No.

Mr. Deikman: Before I ask this question I would like to point out to the Court that Defendant's Exhibit T is a typewritten copy of a statement given by the witness.

Mr. Kelley: And signed by the witness.

Mr. Deikman: And signed by the witness. Now, Mr. Kelley can correct me if I am wrong, but it seems to me that

I recall in the last trial that there was a handwritten statement covering the identical subject.

[fol. 980] Mr. Kelley: I don't recall that, but I recall that you got the statement, and I think it was offered in evidence, whatever it was, in the last trial with some portion of it stricken out.

Mr. Deikman: In view of the fact that Mr. Kelley doesn't recall this may I ask whether or not he did give a handwritten statement?

The Court: The record in the other trial will show, so, I am not going to put this witness's memory to a test about what somebody offered in evidence at the other trial if that is what you are getting at.

Mr. Deikman: I want to ask him whether this Defendant's Exhibit T is based on a handwritten statement that was given.

The Court: I think he testified about it already in court in great detail, didn't he?

Mr. Deikman: I don't believe anyone asked him about a handwritten statement.

Mr. Kelley: I do not think they asked him that specific question. The same statement as I recall was furnished the defendant in the last trial, and I think it was even admitted into evidence, isn't that correct, Mr. Deikman?

Mr. Deikman: That's correct.

Mr. Kelley: I don't get the point.

Mr. Deikman: As I recall, it was handwritten. I may be wrong. The record doesn't reflect whether it was handwritten or not.

The Court: The exhibit is here if it was offered in evidence.

Mr. Deikman: That's right. I haven't had an opportunity to look at it.

The Court: You had better check on that.

[fol. 981] Mr. Kelley: If you find any discrepancies, then you can point out—

Mr. Deikman: I am not suggesting, Mr. Kelley, there are any discrepancies. What I am getting at is whether this statement was prepared by the witness, and—

The Court: He has testified to that in this trial yesterday several times. I am not going to—

Mr. Deikman: All right.

Q. Now, on page 1556 of the record appears this question and answer: "Mr. Mason, I will ask you to look at Defendant's Exhibit U for identification consisting of three pages beginning on our page 29 and ask you whether that doesn't refresh your recollection that you talked to Mr. Zoeller on April 13, 1955, which date I am pointing out to you appears on the second of these three pages. Answer: I remember the conversation, not in detail, however." Now, Mr. Mason do you recall whether Mr. Zoeller took notes on April 13, 1955, concerning your conversation with him at that time?

Mr. Vincent: The Government objects to that. I cannot see any point to this.

The Court: I don't know whether he did or not. The witness can answer the question.

A. Is this conversation bearing on the statement I signed?

Q. You may look at Defendant's Exhibit U.

A. I can't recall whether he took any notes or not, but I assume, however, that he must have. As I recall the conversation, it was a conversation, you call it a meeting with him, but I recall having talked with him, but without reading it carefully I would not know the contents of the conversation or I would not remember it without having this document to refresh my memory.

Q. Would it help you to answer that question if you did look at the document more carefully?

The Court: The question whether he made any notes and whether this witness saw them and this arguing around about his recollection or what was said or done has no bearing on the thing whatsoever.

[fol. 982] Mr. Kelley: I think he has already answered the question, your Honor.

The Court: I think he has too. Proceed with your next question.

Mr. Deikman: Your Honor, I am through with this witness. That completes our examination.

The Court: What do you wish to say that you think you have established as to what you think you are entitled to on the basis of his testimony?

Mr. Deikman: The witness has testified that he assumes that on the various occasions on which he talked to the FBI Agent Zoeller that Mr. Zoeller took notes of those conversations. In addition to the witness's testimony concerning his assumption I think that the reports, themselves, indicate that notes were taken by Mr. Zoeller, and for that reason we feel that those notes properly fall within the definition of "statement" under Section 3500.

The Court: What basis? That is what I can't follow you on.

Mr. Deikman: That they were a contemporaneous recording of the witness's oral statement which was substantially verbatim. Now, the question is, what does "substantially verbatim" mean?

The Court: That is only one phase. Where is there any evidence whatsoever that they were even attempted to be verbatim, because there is no testimony, and this witness naturally doesn't know what were contained in the notes if they were made, and there is nothing to indicate they were taken verbatim or intended to be verbatim. That is the part I want to know.

Mr. Deikman: If the Government by submitting these statements which we do have and in view of the position of the Court that all documents submitted by the Government do fall within the definition of Section 3500 it follows that even the Government concedes that the reports which we have been provided under Section 3500 are substantially verbatim.

Obviously, they were based on notes. Those notes must be [fol. 983] even more substantially verbatim than these records which were made less contemporaneously with the witness's conversation. Now, that is our position, your Honor. I do not believe that we will argue it any further.

The Court: I do not think that position is tenable. Do you have any other basis that you think would make anything or identify anything in his testimony that would be properly producible either under 3500 or otherwise?

Mr. Deikman: Yes, your Honor. The witness has testified that the attorneys in the first Travis trial were always taking notes of his conversations with them, and he said that generally about all attorneys with whom he talked in preparation for his testimony. We take the position that that evidence is sufficient to establish that such notes were taken, that they were contemporaneously made, that they were substantially verbatim recitals of the witness's statement to the attorneys at that time. Your Honor, may I be permitted to reverse myself? There is just one area I would like to inquire of the witness further about. I forgot to ask him about his preparation for this trial.

The Court: All right, you may inquire.

Q. Previous to your—

The Court: I thought though he went into that, I am not going to say, but I think, I had the impression, somebody correct me very quickly, if somebody didn't testify that he talked to Mr. Kelley and Mr. Witt had a question in open court like that, and I gave him permission to ask that, and he said he didn't intend to pursue it. I have a further recollection that you asked him the question in the courtroom and I sustained the Government's objection on some basis or held it up, and then I came in Chambers, and I thought I said it would be all right to ask the question, and you said in view of what Mr. Kelley said in here you didn't think you would pursue it. We might as well have it for the record, and you can go ahead and ask him.

Q. Just previous to your testimony in this trial did you have occasion to discuss your testimony with any attorneys for the Government?

A. Yes.

[fol. 984] Q. Who were those attorneys?

A. Mr. Crandall is the only one.

Q. Mr. Crandall is the only one?

A. Yes.

Q. How long before the trial did you see Mr. Crandall?

Mr. Kelley: He has already testified to that I think.

Mr. Deikman: I don't believe he did, Mr. Kelley, but I think we will get at it more expeditiously if we let him answer the question.

A. I would say about a month before the trial.
Q. Where was that?
A. In Butte.
Q. Where in Butte?
A. At the Hotel Finlan.
Q. At Hotel what?
A. Finlan.
Q. And why—is that your residence?
A. No, that was Mr. Crandall's room.

The Court: What is the difference whether it was his residence or wasn't his residence?

Q. How long did you talk to Mr. Crandall on that occasion?

A. I should say about an hour one evening and perhaps a half hour the following evening. However, when I mention hours here I am referring to the overall meeting with Mr. Crandall, and we talked about many things that have nothing to do with the testimony in the Travis trial.

Q. In view of that answer how long would you estimate that you talked to him about your testimony in the Travis trial?

A. I could not say.

Q. Did you provide Mr. Crandall with anything in writing at that time?

A. I believe not.

Q. Did Mr. Crandall take notes of your conversations?

A. Now, if someone was to ask me now if you had taken any notes this morning it would be very difficult for me to answer. How can I answer that? I believe he took some notes. I just don't remember of him holding a pencil or pen.

Q. Did you have any further conversations with Mr. Crandall in preparation for your testimony in this trial other than in Butte?

A. Nothing in the nature of a formal meeting. Perhaps a question or two prior to the trial Mr. Crandall may have asked here in Denver.

Q. When did he ask you a question or two?

A. Oh, I believe a day or so after I got into Denver. I, [fol. 985] don't just recollect the evening that, or evenings that I talked to him.

Q. Where have you talked to him?

A. I believe at the office of Mr. Kelley.

Q. Was anyone else besides Mr. Crandall present at that time?

A. No.

Q. Was Mr. Crandall taking notes on those occasions or —strike that. Are you speaking of more than one occasion?

A. Well, I am not sure. I have been at one or two, perhaps even three times that we briefly referred to the subject for which I am in Denver, but I saw Mr. Crandall quite often during the last couple of weeks. We discuss other things.

Q. Just relating to your conversation with him concerning your testimony in this trial, how long would you say your conversations lasted altogether?

The Court: What do you mean by that? I can't understand any necessity for all of this detail or what it is developing or anything else.

Mr. Deikman: I won't ask it if your Honor objects to it.

Q. Did Mr. Crandall take notes on those occasions?

A. I suppose he did.

Mr. Deikman: I believe—

Q. Have you talked to Mr. Crandall concerning your testimony since your direct examination but before your cross examination?

Mr. Vincent: If your Honor please, the Government objects to that.

The Court: I do not see the purpose of that unless there was some statement made and his testimony on direct examination was the criterion of his statement under the statute.

Q. Are there any other occasions other than you have already mentioned in which you believe that United States Attorneys took notes of your conversations with them concerning your testimony in this trial, Mr. Mason?

The Court: I don't think you need to answer that. He has gone into every single instance specifically and all the way

[fol. 986] down the line, and I don't know how the question could be answered.

Mr. Deikman: That completes my examination.

Mr. Crandall: May the record show that he is excused, because he has to make arrangements to return?

The Court: I believe he is excused.

Mr. Deikman: It depends on how your Honor rules on an additional motion I wish to make.

The Court: Let's get rid first of this attorney's business. You were discussing that, and then you asked to examine Mr. Mason. Do you have anything further to say?

Mr. Deikman: Yes. On that let's get to that. The witness has testified that Mr. Crandall probably took notes—I am paraphrasing what he said; I cannot recall exactly what he said as his exact words, but I hope I am not being dishonest in saying that that is the effect of what he said. It is our contention that such notes fall within the definition of Section 3500 as to statements.

The Court: On the basis that they are substantially verbatim recordings of the conversation?

Mr. Deikman: Yes, your Honor.

The Court: Well, I do not think there is anything in the record that would support that contention with respect to these last matters or with respect to any of the conversations or conferences or whatever they may be called between the witness and various counsel for the Government at the time of these hearings or immediately preceding the hearings. I think it should be inferred and must be inferred that the matter of the testimony to be given was discussed and the attorneys made notes to assist them in conducting their examination of the witness. There is no indication to the Court that any of these attorneys attempted to sit down and write out in longhand verbatim what the witness said. If they desired to do that, they would have called in a stenographer or made some arrangements to take the testimony verbatim. I mean on the basis of any sound inference that I understand to be drawn it has [fol. 987] to be assumed that these were simply notes for the benefit of the attorney in conducting the examination of the witness, and under that theory they would not come under 3500 at all.

DENIAL OF MOTION FOR PRODUCTION OF STATEMENT RE INTERVIEWS BY MASON AND ATTORNEYS RE PREPARATION FOR TRIAL

In each and every instance I think it has been established that after the conference with the attorneys that there was no transcription of the attorneys' notes made or any record had been made, and, again, submitted to the witness for his approval or disapproval or for signature or anything else which, again, brands them clearly as not coming within 3500 under any theory. So, the position for production as it relates to any reported statements arising in any of these interviews with attorneys preparatory to the trial will be denied.

Mr. Deikman: In view of your Honor's ruling I would like to make another motion.

The Court: All right.

MOTION TO REQUIRE UNITED STATES ATTORNEYS TO MAKE AN INVESTIGATION OF THEIR FILES AND DENIAL THEREOF

Mr. Deikman: The defendant moves that the attorneys for the prosecution be required to make an investigation to determine whether there are in their files or the files of any other United States Attorney or attorney for the Government any materials which were substantially verbatim recitals of the witness's oral statements made contemporaneously with his making of such statement.

The Court: I see no basis whatever for that request, and it will be denied.

Mr. Kelley: May it please the Court, in view of some of the statements of Mr. Deikman as to obvious assumptions or conclusions that could be drawn from what he developed on the questions of the agents' reports and their notes and so forth I would like to say that from the testimony as it relates to the documents which have been presented and offered in evidence that it is a fair assumption to draw from the comparison of the testimony and the notes that the agent either made fragmentary notes or relied entirely on his memory, and I want it also to appear in the record that the Government represents that it has produced all that it can find after a diligent search of anything that

even remotely comes within 3500, and on the basis of the [fol. 988] position that the Court has taken as to the interpretation of the Court's function in connection with 3500 we feel that we have produced many things which are not statements under 3500.

The Court: Do you have any other motions to make?

Mr. Deikman: In view of Mr. Kelley's remarks I would like to ask Mr. Kelley whether he has made a complete investigation, or any attorney for the prosecution has made a complete investigation to determine whether or not there are any substantially verbatim recitals made by the witness to attorneys for the Government which were contemporaneously written down or recorded.

Mr. Kelley: I would make this statement to counsel: that there are no statements that have not been produced that would come within 3500 by any interpretation.

Mr. Deikman: I feel that the answer was not directly responsive to my question.

The Court: Let's go into something else. Do you have any motions to make? Let's get this disposed of.

Mr. Witt: Yes. Mr. Deikman is beginning to refer to our motion with respect to grand jury testimony which I will make, and, of course, it is the same motion as with respect to the other witnesses, that is, Mr. Mason's grand jury testimony on both occasions in this court with respect to Travis being produced either directly to the defense or, in the alternative, the Court to determine whether that testimony contains any contradictions of Mr. Mason's testimony in open court. Just these few words, I hope they will be few, in support of that motion in connection with this witness: One, we think the testimony of the witness in open court definitely demonstrates contradictions with respect to his relations with the FBI in general when he talked to them about Travis and in general a good many contradictions. Two, the record in open court together with the exhibits indicates that conclusively from Mr. Mason's own testimony together with the interest that he has been mistaken in the past about some of his testimony. I refer specifically to his testimony about his conversation with the defendant in July of 1949 about the defendant's resignation from the Communist Party. Before the NLRB

[fol. 989] Mr. Mason testified that that conversation took place during the course of an Executive Board meeting in Chicago. When he testified against the defendant the first time on the first trial he changed that and said that conversation took place in Denver. In between—I should say that he testified before the NLRB in May of 1954 and on the first trial against the defendant in December, 1955—in between on August 24, 1954, according to one of the statements furnished to the defense by the prosecution under Section 3500 Mr. Mason had advised the FBI in Butte that the testimony he had given about the city where that conversation took place had been wrong. As a result of that he corrected it when he testified against the defendant on the first trial. Finally, and connected with that and cutting across all of this witness's testimony is the statement he made to the FBI contained in Defendant's Exhibit P I think it is for identification, not that it matters because this particular item is in evidence, the item which begins at the bottom of our page 35 and runs to the top of 36 whch is now in the record, that is that short paragraph, and I would like to read it into the record at this point: "Mason advised that from the time of the 1946 IUMM&SW elections Travis and he became more intimately acquainted. In all conversations Travis probably out of respect for Mason's knowledge of the Union and the Party and its program always spoke freely about his being a Party leader, about Party forces in the Union, and the Party program in general. Mason states he is unable to enlarge on this information as to dates, places or specific individuals or incidents."

Mr. Mason said that to Agents Kreitner and Zoeller on June 7, 1955, before he testified either on the first trial against this defendant or this trial. Despite that statement of his that he is unable to fix dates and places and names of specific individuals in open court on the witness stand all of his testimony about his conversations with Travis fix more or less exact places, dates, and individuals, and that is a contradiction which goes to the very heart of Mr. Mason's entire testimony.

Mr. Kelley: But there is no contradiction shown between what he has testified to in the court room and what he tes-

tified to before the grand jury, and that is where the contradiction must appear, and we must have evidence of some third party that he made a statement that he testified differently before the grand jury than he has testified in [fol. 990] court, or it must be one of those special types of cases. As to the language thing that Mr. Witt mentioned, on these dates where there was any question about the accuracy of the witness's testimony Mr. Witt has presented vouchers to refresh his memory and correct it so that it doesn't seem to me there is any issue on it in the first place. But be that as it may, and I might say that the Government doesn't agree with the assumptions of Mr. Witt in his summarizing the matter, except that as to the location of a certain conversation which he testified to before the NLRB and which he has since corrected, and there have been no challenges to the accuracy of the conversation, so that we say that there is no foundation laid for the production of any grand jury testimony.

Mr. Witt: I won't waste time answering Mr. Kelley. I think I have said all I need to say in the past on this business about the secrecy of the grand jury testimony. Mr. Kelley says we haven't shown any contradiction of the grand jury testimony. If we did, we would not be making this motion. We would have it. Mr. Kelley has that testimony. We don't. So, Mr. Kelley is making a fetish of the veil of secrecy over the virginity of grand jury testimony, and the time will come when that virginity will come to an end the same way the time has come when the virginity of FBI documents finally came to an end.

The Court: This question has been gone over in connection with similar motions made relative to the witness's Eckert and Garner, and we have discussed the law in connection with the motions in those cases as appeared in the record, and for the reasons indicated the Court feels that there is no purpose that would be accomplished by elaborating on the matter at this time, and the motion will be denied on the same basis I have denied the motions for production of grand jury testimony and minutes as to these other witnesses. That excuses Mr. Mason, doesn't it?

Mr. Kelley: Yes, Mr. Mason should be excused from further attendance.

The Court: All right.

[fol. 991] Afternoon Session

In Open Court

The Court: Mr. Kelley.

Mr. Kelley: May it please the Court, the Government has completed the presentation of its testimony on its case in chief and rests at this time.

In Chambers

The Court: What is it you wish to take up at this time?

Motion to Strike Testimony of Eckert and Denial Thereof

Mr. Witt: At this time, if the Court please, we move to strike the testimony by the witness Eckert about his attendance at schools in this country and in Moscow and the testimony of the witness Eckert on the so-called can't-resign policy of the Communist Party. Eckert's testimony about his attendance at Party classes and schools appears on page 80, and his testimony about the can't resign policy appears on page 301. That is the motion.

The Court: What is the position of the Government about their motion to strike?

Mr. Kelley: Well, our first position is that, your Honor, the matter was argued out in Chambers and the Court ruled on it. As to the school business it has been argued a couple of times

The Court: That was kind of my impression. There was something about a continuing motion to strike testimony that wasn't connected up, however, that they may be thinking about. My own memory is, and, of course, the record will disclose what happened, we had a full discussion about that before he was permitted to answer this question about what the policy with respect to resignation was.

Mr. Kelley: Yes, I have that. It was on page 297. You stated that, "I have reached a conclusion that the Govern-

ment may be permitted to inquire about laying any additional foundation as to whether the witness is acquainted with the policy with respect to this matter, and then if he states affirmatively that he was—I think he already has gone [fol. 992] that far—that he may then be asked what the policy was, and I think also that the record might show that the defense may, of course, have a continuing objection to this line of testimony, and they have, I think, objected very specifically to this particular question; but, I want the record fully protected so there will be no question about their objections."

The Court: I assume that part I cited about continuing objection it is a matter for keeping the record straight, and I would not want there to be any confusion in the record that they had proceeded with due diligence to ass... the motion.

Mr. Witt: We did, no question about it, have long colloquy about it particularly Mr. Kelley's agreement and the Court's statement about the agreement with us that this testimony has to be connected personally with the defendant, and then Mr. Kelley said it would be and specifically referred to the fact that it would be connected up by the witness Horie at which point I said, if I recollect his testimony, unless he changed it or would change it now, it would not be connected up.

Then at page 295, two pages before Mr. Kelley referred to the record, he referred to page 297, the Court made the customary statement about the prosecution not being able to put in its case at one time so this is subject to connection. That will be found in the one full paragraph beginning just about the middle of page 295.

The Court: Did that relate to this particular testimony?

Mr. Witt: Yes, sir. That is after the discussion we had in the course of which we all agreed that, if there was such a policy of the Communist Party according to the witness Eckert, it could not be imputed to the defendant under the Fifth Amendment and under the cases and that it had to be connected personally with the defendant the result of which Mr. Kelley made the statement that it would be connected up mentioning, as I said, specifically the witness Horie at which time I said what I already said I said about it.

Then in connection with this whole problem, as I was beginning to say, the Court said at page 295, as follows: "Now, we all know that you cannot prove the whole case by one witness."

[fol. 993] Mr. Kelley: What page are you on now?

Mr. Witt: 295. "The United States said that there will be evidence presented in the course of the trial that will show the connection, as they call it, or the fact from which knowledge can be inferred, and also, of course, of conduct which would amount to subscribing to the principle and following the principle, in fact."

And in the next paragraph your Honor went on to say, "Again I think that the objection will have to be overruled at this time on that basis." Et cetera, et cetera.

Mr. Kelley: Well, as to that I would say this: that I don't see the point. The place you said I made the statement about Horie—

Mr. Witt: That is page 259, Mr. Kelley.

Mr. Kelley: I would like to see what we were talking about.

Mr. Witt: We were talking about what I said we were talking about. You begin at the bottom of page 258, Mr. Kelley.

Mr. Kelley: At that point the Court was under the impression that before we could put that testimony in that we would have to show that there was no constitutional provision or other written policy in connection with it. Now, I think maybe I did mention something that the witness Horie might say, but I want to call the Court's attention to this fact: I think our only obligation was to connect it up. We didn't use the wit ess Horie, but we used the witness Gardner, and the witness Gardner had a long discussion with Mr. Travis about this matter of resigning and his particular so-called resignation from the Party and what a mistake it was and how it played into the enemies' hands, so that it was brought to the attention of the defendant.

Also, all of the evidence shows that Mr. Travis was active as a Communist in his union operations all during the period covered by our testimony from '48 up through at least '53, I forget how far we brought it but some place up

[fol. 994] into '53. So that there is sufficient connection for the jury to weigh the thing, and the only thing I can see is that what Mr. Witt is talking about may go to the weight of the testimony but not to its admissibility but its propriety being in the case for the consideration of the jury.

There is one other thing that I should point out to the Court, and that is the witness Mason testified to the fact that Mr. Travis had discussed his resignation with the witness Mason and the fact that he had cleared that with Ben Gold and the Party people in New York which directly ties in and connects with the question of resignation.

Mr. Witt: I think this statement by counsel for the Government, the United States Attorney for this District, about the testimony of Gardner and Mason is incorrect. Your Honor, let's be clear what we are talking about. We are talking about the so-called can't-resign policy and not about Travis's resignation as such. Mr. Kelley is entirely mistaken in saying that either Gardner's testimony about his talk with Travis in 1951 or Mason's testimony about his talk with Travis in 1949 had to do with the can't-resign policy.

Here is Gardner's testimony. I won't go over it, your Honor. It is here, it runs over two pages about that occasion, 966 to 967. It has absolutely nothing to do with the policy of the Communist Party about not being able to resign.

As far as the conversation with Mason is concerned that too had nothing to do with the can't-resign policy. This is a criminal case after all so that the mere fact that the word "resignation" appears in some testimony doesn't permit an inference to say from that testimony that the can't-resign policy was being discussed. Taking Mr. Kelley's own statement as to what Mason said that Travis said, Mason said that Travis said he had cleared with Ben Gold and the boys in New York or the Party in New York, it really doesn't matter, he had cleared his resignation with them. If anything, that is testimony for the defense on the fact that Travis had actually resigned and that Ben Gold and the other boys or "Guys" or "Dolls" or whatever they were in New York had agreed he could

resign. They had not agreed to the policy that he could resign. It just doesn't add up. We will take it either way. [fol. 995] The Court: Well, of course, the matter really divides into two parts. I think there have been very extensive discussions about the whole thing as we have gone along. The first question in which the defendant moves to strike has to do with the witness Eckert attending schools I think in Moscow, and I think he mentioned some other schools, and he answered something to the effect that he had. I think that is about the size of the first question.

Now, you will recall in connection with that that at the time—I think the record brings this out—there had been advance objections that might be called on the part of the defense about going into the details of his training and the things that were taught and what his activities were at these schools on the basis that that testimony might be prejudicial and inflammatory and things of that sort. I think it was rather on that basis that the Government did not go further into the question of these schools.

In the first trial I understand not only his testimony about attending the schools had been admitted but also that in considerable detail there had been testimony relating to his activities at the school and so forth. That question, of course, was asked as a basis for establishing foundation for the asking of the question about policy, and, so, there is no connecting up in the sense that we have been talking about with respect to that question at all, because, if it is admissible at all, it is admissible as a question of foundation for the purpose of attributing to the witness the right to express an opinion because of his familiarity with the structure and organization of the Party and so forth.

The record will also show that the Court in the first instance was of the opinion that possibly this matter of what we have been calling policy relative to resignation as might be testified to was a matter of direct testimony as distinguished from expert testimony, but as the case proceeded I think the record will show that I think the Court concluded that it was wrong in that theory, and then I decided as was indicated on page, whatever page it was Mr. Kelley just read, page 297, is that right?

Mr. Kelley: Yes.

[fol. 996] The Court: On page 297 of the record that the Court felt that there had been sufficient foundation laid to enable the witness to answer the question in regard to the policy of resignation as an expert and permitted the question to be answered.

Then, of course, comes the problem that Mr. Witt has been talking about of whether there is anything in the record to connect that up with Mr. Travis. Without attempting to detail the evidence or state critically what the testimony was it seems to me generally that there is no question that the evidence showed that Mr. Travis, I think it is admitted, as a matter of fact, up until the time of this question of resignation was a member of the Communist Party. It also appears from the Government's evidence that he associated very frequently and often with people whom the Government witnesses have identified as being members of the Communist Party with respect to policies of that Party in the Union and otherwise generally.

Then, coming to the testimony of Mason and Gardner it seems to me, if that evidence is considered along with all the other evidence about Travis's association with the Communist Party, that an inference could be drawn from the evidence that he did know of this policy of resignation and that was inherent to the discussions. Now, on the other hand, it may be argued that he didn't. Mr. Witt just pointed out I think in his statement that it might possibly be inferred that he had cleared it in the sense of receiving permission to resign or something of that sort. But with the evidence as it is I think that is a question purely and wholly for the jury. So, my conclusion is that the motion to strike will have to be denied.

Motion for Mistrial and Denial Thereof

Mr. Witt: All right, your Honor, at this time we move for a mistrial because of this same testimony by Eckert, one, his testimony about his attendance at schools in this country and in Moscow because in addition to the fact that that is not connected up with the can't-resign policy in terms of the defendant it is clear on the record that that testimony wasn't necessary to qualify the witness as an

expert and especially in view of the way Mr. Kelley eventually put his question to him which was different than on the first trial where he was permitted to give an answer to the question as an expert and where the question comprehended attendance at schools unlike the question in this case, and, since we think we are right about the failure to [fol. 997] connect Mr. Eckert's answer to the question about the can't-resign policy with the defendant, we think that answer together with Eckert's testimony about his attendance at schools makes it impossible for this jury to decide this case on the issues and on the merits and on admissible evidence.

The Court: Well, it is my impression, I may be wrong about that, that the motion for mistrial was made and denied once before. I may be entirely wrong. So there may be no question in the record it may be shown now that the motion for mistrial on the ground Mr. Witt just stated is denied.

I think further I should add to what I said for the record which was suggested by the thing Mr. Witt just mentioned, as I understand, at the first trial not only was evidence with respect to this attendance at the school in Moscow admitted in evidence but that the Government went into some detail with respect to things that transpired there or what the witness was taught there and then was permitted to ask the question from the witness as an expert as to the policy of the Party with respect to resignation.

I think in addition to that there also in that trial was permitted an answer by the witness with respect to some other matters of policy that were not gone into here. The point I am making is that that whole matter and more was contained in the first trial. The Court of Appeals had the record from the first trial, and I am inclined to think, if they had felt there was anything prejudicial in that evidence or in that procedure, that some mention would have been made in the opinion concerning the matter, because they reversed the case and remanded it for new trial, and some of the particulars that were mentioned, obviously the comments were for the guidance of the court on retrial, and I can't help but think that they would have said

something about it in their opinion, which it is my impression it doesn't mention the matter, is that correct?

Mr. Kelley: That is my recollection, your Honor.

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[fol. 1019] COLLOQUY RE OFFER TO STIPULATE THAT DEFENDANT TRAVIS WAS A MEMBER OF THE COMMUNIST PARTY UNTIL AUGUST, 1949

The Court: That disposes of one thing, and the other thing that I remember that was held over from the last conference we had which I think was on Friday was with respect to the desire of the defense to announce at the opening of their case that they wish to admit Mr. Travis was a member of the Communist Party up to a certain time, I don't recall the exact date. The Government wanted to think the matter over over the weekend. What is your conclusion now?

Mr. Kelley: Your Honor, a search was made to find some law on the proposition, and we didn't find any specifically on the point. The Court will recall that on a number of occasions statements of counsel have been made and the Court has advised the Jury that no statement of counsel should be considered as evidence and that they should disregard statements of counsel. It seems to me that this might fall in the same category. Mr. Witt has stated on Friday, as I recall, that he didn't or wasn't making the statement for the purpose of asking for any specific instruction or for any other purpose than to be able to argue his resignation in 1949. Wasn't that substantially it?

Mr. Witt: No, not quite. I had better state it myself so there is no doubt. It is a rather touchy point, and I think the record ought to be clear on it. The record now shows, if the Court please, that our letter, the defense letter to Mr. Kelley, I forget the date of it, I don't have it here, it doesn't matter, a few days before the trial—Mr. Deikman says the date of it was January 10, 1958—offering to stipulate that the defendant was a member of the Communist Party until August, 1949, is a part of the record, it became part of the record in connection with our objection to all of the testimony of Eckert as being remote, and in

connection with that argument we argued that the only reason for getting it in in light of our offer to stipulate about Travis's past membership was to confuse the issues and to prejudice the Jury. So, it is part of the record on that legal issue, the admissibility of all of Eckert's testimony. However, it is not in any way before the Jury except insofar as I said in our opening statement that we don't contest Travis's membership before August of '49.

Now, we want to get the matter before the Jury now not to further strengthen our argument against the admissibility of Eckert's testimony. The record is made on that. [fol. 1020] We want to get it before the Jury now so that we can say in our summation without using the letter embodying the offer to stipulate itself, so that we can simply argue to the Jury that as far as we are concerned it has never been an issue in this case, that is, Travis's membership until August, 1949.

The Court: What do you wish to say to the Jury, you mean right at the start of your case?

Mr. Witt: Yes, right now.

The Court: Before you start to offer your evidence you want to say what?

Mr. Witt: We want to say that as we told them in our opening statement in this trial we have not contested the fact that Travis was a member of the Communist Party in August, 1949, and that in fact before the trial began we offered to stipulate with the Government as to that item.

Mr. Kelley: The Government's feeling on this, your Honor, in the first place, the statement partakes of the nature of evidence from the defendant on a particular point, and there is no opportunity for the Government to cross-examine. We objected originally to the offer to stipulate on the point, because the mere admission of membership doesn't show the degree to which the defendant adhered to the policies and programs of the Party and for the same reason this statement made by counsel is in effect putting in evidence a point without giving the Government an opportunity to cross-examine. It seems to me it is just a mere statement of counsel which should not be considered as evidence nor given the right to argue the point to the Jury.

The Court: I do not think that it is evidence in that sense. I do not think anyone contends that it is evidence, but I do not see any reason why the defense cannot say they do not contest the fact that he was a member of the Party up until this period they are talking about. I do question whether you ought to say anything about your attempt to stipulate with the Government on the thing.

Mr. Witt: May I say something on that if I may and answer Mr. Kelley?

The Court: Yes.

[fol. 1021] Mr. Witt: This suggestion of ours is made in an attempt to avoid a situation which as lawyers in this case Mr. Deikman and I do not like, that is, putting Mr. Kelley on the stand.

The Court: Mr. Kelley?

Mr. Witt: Yes, to prove by him that he did receive this letter from defense counsel.

The Court: I do not see the pertinency of that. That is what I do not follow. I am agreeing with you, I see no objection to your saying that you do not contest the point, but I do not know that there is any proper place to say that they refused to stipulate. They have a right to offer their evidence, and they have done it. If it was a situation, as I pointed out the other day, where the defendant offers or stipulated to something as a matter of fact and then they had offered no evidence and later it was contended that the admission or whatever you want to call it was not binding on the defendant, you would have a problem, but that is not the situation here. The Government has offered all of their proof, and it simply, they wanted to substantiate their opening statement to say that, "We still could not contest the fact that Mr. Travis was a member of the Party during the period that they have indicated." I see no objection to that. But I doubt whether it is proper to say that they offered to stipulate, because the Government would be obliged to accept that stipulation, and the implication might be that the Government did something to prolong the case or something. I do not know exactly what.

Mr. Witt: Well, your Honor, let me be a little more specific and spell out my thinking. First, I was wanting to say another word in answer to Mr. Kelley with reference

to his argument that they could not cross-examine. If we are right technically, leaving aside the unseemliness of calling Mr. Kelley to the stand, technically, we think we can call Mr. Kelley to the stand and ask him whether he received this letter offering to stipulate. Then, with respect to cross-examination that is open to the Government. They can cross-examine Mr. Kelley or they can put in rebuttal evidence if they can figure out something to do. We do not take away that right.

Now, since as the record stands especially in view of Mr. Kelley's statement that they turned down the offer to [fol. 1022] stipulate in order to show what kind of a Communist, Travis was, however Mr. Kelley put it, they have tried to do that through the witness Eckert, and we have a right to answer that in our defense, and one of the ways we think we can do it and have the right to do it is by this offer to stipulate.

The Court: Well, I am not so sure, I wonder if anybody has looked at the record, my own feeling is that the Jury already has been told about their willingness to stipulate about that fact, because my memory is that in the court—I may be entirely mistaken—Mr. Witt or Mr. Deikman, I don't recall which one, objected to the testimony of Eckert after they offered to make the stipulation I think right in the courtroom.

Mr. Witt: Even if that were so, I think your recollection may be right, I may have said something before the Jury when we objected to Eckert's testimony at the very beginning and before we went into Chambers, still, what I said isn't in evidence especially in light of the fact that your Honor has reminded the Jury on more than one occasion that statements of counsel are not evidence.

The Court: I do not believe it is evidence frankly.

Mr. Witt: That is the issue.

The Court: I think it comes in this category: I think, for instance, if you take a murder case, just to take an outside analogy, the Government started to offer proof about the acquisition of a gun by the defendant with the idea that he had gone down there a few minutes before the shooting and had gone into some pawnshop or some place else and bought the gun in an attempt to identify the defen-

dant as the owner of the gun involved, I do not know any reason in the world the defense could not get up and say, "We concede that the defendant here had that gun," and the Government will say, "We are going ahead with our proof anyway so there won't be any mistake about the sufficiency of the proof," and you go ahead with the proof.

Mr. Witt: That doesn't meet my argument, your Honor, and perhaps I didn't make it clear when we talked about it the other day. It is not merely the admission of a material fact or any kind of a fact that the Government is seeking to prove. In addition, it is important to us, we think it is [fol. 1023] for the Jury to know not only that we admit it but that we volunteered, we offer the Government an opportunity to take it out of the case and that the Government rejected it for its own purposes. We think that adds an element.

The Court: I do not think it is evidence, but, on the other hand, I am rather sure it is not evidence, because if you came to the question of sufficiency of proof, say, on the thing, I do not think the Government could come in and say, "Well, here they admit it in open court that Mr. Travis was a member of the Party during this period," I do not think that would suffice in the way of proof.

Mr. Witt: Not now, not on the basis of this record.

The Court: Any time, because then you would immediately raise the question of whether the admission, and I am speaking strictly in terms of what I call admissions, I doubt if the admission would be binding on Mr. Travis. On the other hand, I cannot see any objection to their saying, "We do not contest the fact or offer no evidence in opposition to it. In fact, we advised the United States Attorney that we concede he was a member of the Party." I do not see an objection to an argument along that line.

Mr. Kelley: I cannot see that he should be permitted to get before the Jury any more than he has, if he has already, the fact that he offered to stipulate. That has no place before the Jury as to what they offered to do and we didn't agree to. Then, Mr. Witt was talking about the Government would have the right to cross-examine me if they put me on the stand answering—

The Court: I do not think your evidence would be admissible. I am very frank to say that right now. What I can't get away from is this: We are faced with a practical situation. I cannot conceive quite of a situation where, take my murder case for analogy, if they would get up and say, "Here, you heard an awful lot of evidence, you heard five or six witnesses come in here and testify about the ownership of this gun, we don't dispute the defendant owned the gun all the time. We offered to—we agreed to it here in open court, and notwithstanding that the United States Attorney saw fit to go ahead and offer all of this evidence." That is all it amounts to. I do not think it is [fol. 1024] evidence or anything else. But I think anybody's legitimate argument—

Mr. Witt: It is a little more than your Honor said we want to do.

Mr. Kelley: Getting back to this question I raised about the right to cross-examine, when Mr. Witt makes the statement that Mr. Travis admits that he was a member of the Communist Party up until August, 1949, we have no opportunity to cross-examine him on the basis of that proof in this case if that is what he wants to call it.

Mr. Witt: Cross-examine whom?

Mr. Kelley: Cross-examine the person, the person for whom the admission is made. You are making that admission on behalf of Mr. Travis. Now, the reason it can't be evidence or can't be considered as evidence in any way is because we have no right to go into the question of his membership which you in effect are saying he was a member until '49 but he terminated his membership at that time.

Mr. Witt: You have no right to cross-examine Mr. Travis on that. He had nothing to do with that except he approved of his counsel in this case making that offer to stipulate, period. This is a legal matter and not anything that the defendant from an evidentiary point of view was enveloped in.

Mr. Kelley: That is the answer to your proposition of putting it before the Jury. It is a legal proposition that was terminated early in the case when you made the offer and we refused it.

The Court: What is there in the world to stop them from getting up and arguing to the Jury that, "Here, we do not contest the fact at all (leave aside the use of the word "admission" in the technical sense) we do not contest that Mr. Travis was a member of the Party up until such and such a time. In fact, as you have heard here before we offered and agreed that the record might so show." Now, where is there anything wrong with that?

Mr. Kelley: Well, the things I have said, your Honor.

[fol. 1025] The Court: How would you escape it?

Mr. Kelley: I would go along with letting him make the statement that the defendant admits that he was a Communist until August 15, 1949, but to add that he offered to stipulate with the Government to that fact and the Government refused, I do not think that has any place for consideration with the Jury.

The Court: It is getting down to a fine point about the Government refusing. I do not think that is proper, because that involves you might say a question of agreement or some implication of the refusal of the Government to agree, but I cannot see any reason they cannot say that they do not contest it—I do not like the word "admit"—that they do not contest that fact at all, in fact, that they offer to agree to that or offer to admit that but without saying you refused it. That is the part I think might be objectionable, because the implication is you have done something that changed the situation. I think they can say they offered to admit that fact or something like that and just go from there.

Mr. Kelley: I think, if he makes that statement, I should be allowed to get into the record at that time the fact that we didn't agree to it for the reason that it didn't go far enough.

The Court: Maybe then, if you are going to get into that, he would be entitled to say in the first place, "You didn't agree to it," and then, if you wanted to get up and say that, I don't see any objection to it.

Mr. Witt: I object to that. That is legal argument. We want to prove a fact.

The Court: But I will agree with you that this is evidence. That is what is bothering me.

Mr. Witt: We do not intend to get before the Jury as to why we did it. That is legal argument. We just want to get the evidence before the Jury, and, therefore, we want the cherry on the sundae your Honor isn't agreeing to, we want to be able to tell the Jury as a matter of evidence or as a matter of agreement in open court that our offer to agree to this before trial was refused. That is the cherry. [fol. 1026] We don't care about the sundae without the cherry.

The Court: I do not believe you can go that far. I believe you can get up and tell the Jury that you do not contest the fact and the fact you offered to agree to, not agree, offered to admit it, and then proceed right now but say that the Government has offered proof on the thing or something like that. In other words, what I do not think is proper in the way of comment is the refusal of the Government to agree. By analogy I would suggest something like some of these other matters that come up, like the one I just talked about this morning: If the Government came in Chambers here and said on this character witness on this cross examination, "We are not going to ask about this contempt business we asked about before," why, I do not think a subject like that is proper for comment before the Jury, because it is not a part of the transaction at all, and I believe it is legitimate for you to say, "As I said in my opening statement, we do not contest this fact, and, in fact, we offer to admit it," but say nothing about the Government's refusal.

Mr. Witt: All right, we get your Honor's position, but we want to make our record on it that we will go as far as your Honor has ruled we may go but we want the record to show that we object to your Honor's ruling that we may not show by evidence or we may not state in open court that the Government refused our offer to agree.

The Court: I do not think you could show by evidence at all that you made the offer or they refused it in that sense. I am rather sure talking about the effect of it, the practical effect, and I may be mistaken, but I think the Jury have practically been told the same thing already as a matter of fact. My memory is rather definite, and sometimes I am badly mistaken, that when they objected in open court the

effect of it was to say, "Here, we are willing to concede that this man was a member of the Party at this period," and that the Government decided to go ahead and offer their evidence because they objected to Mr. Eckert's testimony I am rather sure in open court to start with.

Mr. Witt: I am rather sure, to say something about what the Court just said, I am quite sure that neither Mr. Deikman nor I at any point referred to the fact that we would offer to stipulate as to this man's position.

[fol. 1027] The Court: I do not think it is before the Jury. I do not think that ought to be before the Jury.

Mr. Witt: Then I misunderstood you. I object to that too. We think we should be entitled to say or to show, one, that we agree that Travis was a member before August, 1949, two, that before trial we offered to stipulate as to that, and, three, that the Government rejected the offer to stipulate.

The Court: On that the Court feels that would not be proper to talk about the stipulation or offer evidence about the stipulation.

Mr. Kelley: What they are trying to do, your Honor, is to have this proceeding that occurred at the start of the trial become evidentiary in the case, and it has no evidentiary value at all.

The Court: I have held this, they could not offer evidence on it and that they should not say anything before the Jury about this offer to stipulate and your refusal to stipulate. I still think they can say they offered to admit he was without saying anything about your position on the thing at all.

Mr. Witt: I do not understand your Honor.

Mr. Kelley: If they attempt to state what our position was, I am sure that the Court would recognize we would have a right to amplify it and make it clear what our position was.

The Court: It is going to be largely a question of argument anyway that you are both going to have to be talking about.

Mr. Kelley: Yes.

The Court: I think they have a right as he did in his opening statement to say that they do not contest this phase of the case. They could do that in any criminal case. They

could do that with respect to anything. If you had an embezzlement case or anything else, you could say, "We do not question the amount of the shortage here at all," the defense could say, "But we say so and so. In fact, we are willing to admit that the shortage was so much," and then go from there into other aspects of the case, but I agree with you [fol. 1028] they should not say, "We offered to stipulate to it and the Government would not accept the stipulation."

Mr. Witt: I am having difficulty following you. It seems to me you keep saying two different things, with all due respect. I am persisting, because I am confused, and maybe it is my fault. At one time you say we can't refer to our offer to stipulate nor the Government's refusal. Then, another time, you just said it again, I think that is the second time, you say that we can say not only that we admit it but that we offered to admit it, and I am confused as to what is your Honor's ruling.

The Court: Well, I think you had better leave out the word "offered". The trouble is, we are using the word "offered" in two different senses, that you are using it in a technical sense, and I didn't mean to imply it that way. I think it should be that you admit he was, that you do not contest it.

Mr. Witt: I do not want to take more of your Honor's time on it. I prefer your Honor now make the statement in haec verba that you are going to make and will make such as you rule we may make, and then once you state that for the record in haec verba we will state our objection to it and why we think it is improper, because I think it is confused up to this point.

The Court: I do not agree it is confusing. As a matter of fact, I want to look at the record, I think the whole thing is in the record.

Mr. Witt: I am confused. It may be clear to you.

The Court: I want to be sure that I am not looking at an in-Chambers conference here rather than in open court, I think this happened in open court. It is on page 40 of the transcript. Here is what Mr. Witt said—as I say, I do not think this is evidence, this is when they were talking about, this is when the objection came in to the testimony about Mr. Eckert attending these schools, and Mr. Witt on page

41 said: "Your Honor, it appears already from the testimony of this witness (that is Eckert) that he left the Party in 1948. The charges in this case relate to the years 1951 and 1952, and, therefore, we object to any testimony from this witness about his biography or about the Communist Party covering the period from 1931 to 1948 on the ground [fol. 1029] of remoteness. Secondly (and this is the part), as your Honor heard me say in my opening statement, we have offered the prosecution a stipulation to the effect that the defendant was a member of the Communist Party during the period until 1949. The only relevant testimony that this witness can possibly give about Travis, and, if he were asked, he would say he never spoke to Travis or had anything to do with him after 1948 after this witness says he left the Communist Party, the only testimony this witness could give would go to the period from 1931 to 1948. Now, we offered that stipulation on this occasion, your Honor, even though we didn't on the first occasion, because we weren't then aware of what kind of a case the Government would make when we went to trial the first time, but now that we know we offered this stipulation in order to remove any possible excuse for testimony from this witness or any other witness about Travis's membership in the Communist Party before 1949. Now, in light of our offer to stipulate we can see no possible reason for testimony from this witness about Travis covering the period from 1931 to 1948 or whenever it is except the prosecution's anxiety to inject prejudicial, inflammatory testimony into this record, and to seek to influence the Jury improperly."

And then there is some discussion here, and then I say that, "I understand his position is that there is no controversy in the case under their admissions here with respect to the situation prior to 1949. Is that what I understand?" Mr. Witt says, "Exactly." And then you say, "That is his position, your Honor, but—" And then Mr. Witt says, "I have several other branches to my argument I would like to conclude."

Mr. Kelley: May it please the Court, in considering this matter, now, first, the statement made by Mr. Witt there is merely an objection which doesn't partake of evidence.

The Court: It is not evidence. This is not evidence at all, but I am wondering where there can be a limitation put on it for argument, is what the question is. It is not evidence.

Mr. Kelley: That is my point.

The Court: I am satisfied of that.

Mr. Kelley: I want to point this out: In your analogies [fol. 1030] you have referred to this matter of the admission of the purchase of a gun, that is a fact that is established. We do not establish a fact in this case in the same way. We have to show, we have to establish a status, the status of being a member or affiliated with the Communist Party prior to the signing of the affidavit or affidavits and the continuation of that status, so, what he has attempted to do by his statement is to take away part of a fact, and he is not admitting a whole fact, but he is attempting to take away a part of a fact.

The Court: I do not see how there is a possibility of escape, or I do not see how there could be a limitation to the argument on the thing. The Jury has already been told for whatever it is worth what they have offered to do and all about it, and I still think that the way to handle it, I think I will sustain your position that they cannot see that the Government refused to do that. I think that throws another implication into it just as I said a moment ago, but up to that I think they can have a free hand and mention what the situation was.

Mr. Witt: Including our offer to stipulate.

Mr. Kelley: If you do that, we are going to object.

The Court: The Jury knows, Mr. Kelley, I might add, you mentioned in the course of this discussion before the Jury you say: "The Government's position is this: (that is when they offered to stipulate) it is not for the defense to suggest to the Government how they put on their case." And then you say: "We have the same issue originally in the case in the first instance except they didn't make the offer to stipulate. Now, they don't offer to stipulate everything we put in by our witnesses. Now, the Government's, one of the rules, and there is an instruction in the case on it, relates to a state of mind or a condition which the Government shows to exist prior to the act which constitutes the

crime, and we show that it exists and the extent to which it exists." And then you go on to say, "All right (there is a discussion there) a fact, and we have to prove that he was a Communist during the periods alleged in the indictment. Well, this is not the kind of a case where you can go down to the City Hall and find out that he is registered as a Communist and prove that he was a Communist on that date, and the reason we go into the prior, part of the reason we go into this prior history is to show the extent to [fol. 1031] which he adhered to the Communist Party and to show and to convince the Jury that the condition continued all during this period of the indictment." You say further, "Then in addition to that, your Honor, this witness is qualified as an expert," and so forth.

I think in the argument you can argue the same thing they did there, and they can argue their side, and it is not evidence, that is a sure thing.

Mr. Kelley: That is the reason it seems to me it is improper to interject it into the case. The only thing that should go to the Jury is evidence.

The Court: How could it be avoided? Independent of this discussion now how could you say to them, "We don't contest the fact that Mr. Travis was a Communist up to certain time," how can you say that to the Jury when the Jury knows already that they offered to stipulate that he was a member of the Communist Party?

Mr. Kelley: Of course, that was three weeks ago.

Mr. Witt: That's right.

Mr. Kelley: Now, let's carry this thing out. Mr. Witt gets up and makes this statement, now, on rebuttal can I get up as part of our rebuttal and say that Mr. Witt has made the statement that they offered to stipulate, we refused, and then put that in as part of our rebuttal?

The Court: It is not evidence. My own thinking is, it is really argument, the whole thing is really argument.

Mr. Kelley: Yes, I think it is too. You have a perfect right to do all of that in your closing argument. It is not time for argument at the start of your case.

Mr. Witt: Maybe we can agree if we have reached that point. I wanted to get it in evidence. I think this may solve it if I follow the colloquy. As I said, the only reason

we want to make the statement or get it in evidence is so that we can use it in our summation.

[fol. 1032] The Court: I think that is the answer. I think between the two of you we have got the answer, that you say nothing about the thing now at all, either one of you, and when it comes to your final summation either one of you, if you bring it up then, they can answer just as a matter of argument.

Mr. Witt: Do I understand, your Honor, that in our summation we can say not only that we admit it but that we offered to stipulate before trial and the prosecution refused? Then, we are satisfied. We want to get it in evidence.

The Court: Yes, I think they can do that, and you can answer in the argument to the Jury, not now in the way of evidence or anything else.

Mr. Kelley: I think I could answer it, but the thing is, putting something into the argument that is not a matter of evidence.

The Court: But it is a matter of the court proceedings. I do not see how you could do otherwise. I do not see how we could curtail it here. They offered to do it right out there before the Jury. Just take my gun case or anything else, I do not know how I could curtail them within the limits of reasonable argument to say, "Now, this happened before the Jury, and you can't say anything about it." I think the way to do it is exactly how you suggested, and I think you can do it that way. You can say that you offered to stipulate and that they would not stipulate, and then the Government can tell why they didn't stipulate.

Mr. Witt: Then, it means we will have to make the statement now in court based on the discussion in Chambers.

The Court: You won't have to say anything now, because this is all before the Jury right now. I just read it.

Mr. Witt: All right. So, you understand we can do it in summation if we decide to do it. Maybe we won't.

The Court: All right.

Mr. Kelley: Then, I think we should have, if you are going to permit it to be based on a statement and an objection, [fol. 1033] that there should be some instruction on the legal effect of this thing.

The Court: I do not see how you can give any instruction on the legal effect of it. It is not evidence in any sense of the word.

Mr. Kelley: That is the point. I think it ought to be specially pointed out that it is not evidence.

The Court: You have got to stand on your evidence.

Mr. Kelley: Yes.

The Court: And nothing they do can detract or add to that. You have got to convince the Jury on the basis of your evidence, not on the basis of any admission or anything else. If they want to comment on the evidence, is what it amounts to, that they are not contesting this right at all, in fact, they offered to stipulate, and you didn't see fit to agree to the stipulation, they can say that just as a matter of reference to what happened in the courtroom, then you can get up and say, "The reason we didn't, ladies and gentlemen—" and you can tell them anything you want to as a matter of argument.

Mr. Witt: Let me say this in answer to Mr. Kelley's suggestion as to a special instruction on this: If he persists in that position, then we want to make an offer of proof in open court on it, because, otherwise, this is selected from the summation for special treatment.

Mr. Kelley: An offer to prove what?

Mr. Witt: An offer to prove we wrote you a letter and you said "no".

The Court: I reiterate this is not evidence. It is in the same category of any basis of anything that happened. You are going to have to take your chances on that.

Mr. Witt: I want to say now that we have got to get a decisive position from Mr. Kelley on this special instruction, because, if your Honor is going to agree with him, if he does think that you should give a special instruction, we want to make an offer to prove in open court.

[fol. 1034] The Court: I do not see any instruction to be given. I can hear what the arguments are and decide what the instructions will be after the arguments, but I do not think, I want to make one thing very clear, I do not want this matter treated as a matter of evidence or any matter referred to as a matter of evidence. It is just exactly like if somebody gets up in an argument and says, "Here, you

heard me object to such and such an attempt, and I did it for such and such a reason," and the other side said, "The reason I took the position I did," that is just pure argument.

Mr. Witt: I understand.

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[fol. 1093] In Chambers

The Court: You may proceed.

MOTION FOR JUDGMENT OF ACQUITTAL AND DENIAL THEREOF

Mr. Witt: Your Honor, at this time the defendant moves for a judgment of acquittal under Rule 29. May I say in that connection that in view of what we are going to stress we wish your Honor would consider ruling on this motion before the case goes to the jury instead of reserving ruling as your Honor, of course, is empowered to do. Also, we didn't come prepared this afternoon to argue insufficiency. Unless your Honor wants to hear arguments on sufficiency in which event we will need a little time to prepare that, we would like to defer that argument. We want the record to be clear that one of the grounds for the motion for acquittal is insufficiency.

Also, although I do not think it is necessary, but I have an impression, I can't think of the case or cases, that some case or cases hold that, if you are urging the application of the so-called perjury rules of evidence to the evidence in the case, that you should so state specifically in support of your motion for an acquittal. At this time we state that for the record, that in our opinion the Federal perjury rules apply to this case, so-called false statement case under Section 1001 in the same way as those rules apply to prosecutions under the perjury statute, itself. Your Honor will recall that that was an issue in the first case with respect to instructions, but we didn't make it in connection with a motion for acquittal in the first case. We do so now.

One other matter that we think we should mention specifically at this time, and it is in connection with this matter, that we think we are entitled to a motion for an acquittal now, the Government's proof is insufficient in a basic respect aside from the insufficiency of the evidence as such, and that is that the Government failed to prove the materiality of the alleged false statements. That is our motion.

Mr. Kelley: That is what the Court finds as a matter of law, isn't it?

Mr. Witt: Not as we view it. We are prepared to argue that at length, because we think the whole history of this case, the history of other cases of similar kind, particularly [fol. 1094] Gold and Jencks and the decided cases support our position, and we think, therefore, that your Honor should hear us on that issue.

The Court: That is what I want, I am getting at, and I am a little concerned on this phase of the thing on a time-table schedule. I would like to dispose of this motion this afternoon. As I also indicated before, of course, I want to give you an opportunity to be heard on it and hear what you have to say, because I wish to be advised on the thing, and you say now if you put that over until tomorrow—

Mr. Witt: I am sorry, I do not mean to interrupt you, but I interrupt you only because I apparently did not make myself clear. On this issue of materiality we are fully prepared right now, and we think your Honor should hear us right now. On insufficiency of evidence apart from the question of materiality I said we weren't prepared although, if your Honor insists, we could do that this afternoon too.

The Court: Let's proceed with your argument, and I would like to have the whole thing this afternoon.

Mr. Witt: You mean the sufficiency of evidence?

The Court: Yes.

Mr. Witt: May I do this then: I mentioned three particular phases of the argument in support of the motion for acquittal, insufficiency of evidence, the perjury rule, and materiality. I do not think the perjury rule is necessary to argue. I think your Honor is bound by the first case.

The Court: I do not think it is necessary to go into it.

Mr. Witt: All we are doing is making our record at this stage the way we did it on the first case. As far as the materiality is concerned I am prepared to go into that as fully as your Honor wants to right now. As far as insufficiency of evidence is concerned we would want a few minutes. So, I suggest this; since Mr. Kelley and ourselves apparently disagree on this materiality point, I would like to state our position on that and maybe Mr. Kelley and his associates will want a little time to answer us, and at the same time

we can be getting ready on the insufficiency of evidence point so we can dispose of that this afternoon.

[fol. 1095] The Court: Let's dispose of this first point, and then we can have a little recess. Was this involved in the first trial?

Mr. Kelley: At page 1459 Judge Breitenstein in his instruction says—

The Court: Let's hear what he has to say. You may proceed.

Mr. Witt: All right, your Honor, our position on that is as follows: that the cases hold that materiality under Section 1001 has to be proved by the prosecution as part of its case. If there were any doubt about that in this particular case, your Honor, the indictment in this case in each of the four counts on which we have been tried makes the same allegation with respect to materiality. I won't read the whole indictment, of course, but I am referring to the clause after the clause about the filing and causing to be filed, because the clause I am referring to reads as follows, and it is the same in all four counts "knowing the same to contain a false, fictitious and fraudulent material statement and representation, to-wit," and then it goes on.

So, we say first that under the law and under the rules with respect to indictments it is incumbent upon the Government to make proof of every allegation in the indictment, and, therefore, it was incumbent upon the Government to make proof of materiality in connection with each of the four counts because materiality is alleged. That is point number one.

Point number two, in the two cases in which we have the record, and I have them here right now, the Gold case and the Jencks case, materiality was not alleged in the indictment. Despite that in both cases the Government made proof by evidence or by stipulation as the case may be in both cases, I think it was by evidence, of materiality, and I am prepared to come back to that and give you the exact point in those records, that is, in both Gold and Jencks, in which the defendants were indicted in 1953, materiality was not alleged in the indictments but nonetheless the Government made proof of materiality on the trial.

As we reconstruct the picture when this defendant was indicted in October, 1954, the Government on a basis par-
[fol. 1096] ticularly of the Rolland case in the Fifth Circuit—I am not necessarily saying it was decided between Gold and Jencks indictments, on the one hand, and the Travis indictment, on the other, it doesn't matter, it is the leading case on this subject—on the basis of the Rolland case the Government had decided by the time Travis was indicted that the law required an allegation of materiality in the indictment, but whether I am wrong or not in any speculation about the Rolland case the fact is that in this indictment the Government did allege materiality.

Now, with respect to the Rolland case and subsequent cases, if the Court please, there is now a sharp split in the Courts of Appeal and in the District Courts as to whether or not materiality needs to be alleged in an indictment under 1001, but, be that as it may, the law is settled, as we see it, that whether or not materiality is alleged in the indictment it needs to be proved, so that, for example, take the prosecution's own position in Gold and Jencks, who were indicted as I say in 1953, who were tried in 1954, Jencks being tried in January and Gold in March, on both of those trials even though the indictments had not alleged materiality the Government proved materiality.

Our next point, your Honor, is that the record of the first trial in this very cause demonstrates that it was the Government's understanding that materiality had to be proved, and in that connection in fact the Government asked us for a stipulation which we agreed to before trial on materiality, and that stipulation was made part of the evidence by Mr. Kelley, himself, at page 18 of the typewritten transcript of the testimony in the first trial in two paragraphs there, and I think for continuity, if the Court please, it would be better if these are read into the record, they are not very long: "It is further stipulated that during the life or the effect of the two affidavits, Exhibits 1 and 4, that the International Union of Mine, Mill & Smelter Workers used the facilities of the National Labor Relations Board. It is further stipulated that the agreements with reference to the Exhibits and the previous stipulation apply only to the facts so stipulated and not to the legal effect of said admitted facts."

So, it is the first sentence of those two that I read which embodies the stipulation with respect to materiality or specifically the use of the facilities of the NLRB.

In that connection, if the Court please, I should at this [fol. 1097] point state for the record, and I am sure there will be no dispute as to this, that before this trial Mr. Kelley discussed with us a similar stipulation. At the same time he discussed a stipulation with respect to the six documentary exhibits at the beginning of the case with respect to which we stipulated on the first trial and again stipulated on this trial, and at the time Mr. Kelley discussed it with us, defense counsel, particularly with me in connection with this trial before the trial began we told him or, again, specifically I told him that we would make the same stipulation with respect to materiality we made on the first trial.

So, that is a further indication that from the prosecution's point of view throughout the history of this case, the first trial and the second trial, the Government has regarded proof of materiality as an essential part of its proof in this kind of a case. Finally, the precise issue as to proof on this matter was decided by the Court of Appeals for the District of Columbia Circuit, and as far as we see it this is the leading case on the matter. This is Freidus vs. United States, 223 Federal Section 598 particularly at pages 601-602. That was decided in February of 1955, your Honor. Again, for continuity I would like to read this quotation which is the entire quotation on this matter from the opinion into the record, and your Honor will have it in convenient form.

Let me say first that in this opinion which is a unanimous opinion of that Court of Appeals the Court decided both that materiality had to be alleged following the Rolland case which the Court relied on and also said in any event that materiality had to be proved. I will now read this quotation from that opinion: "One portion of Section 1001 refers to willfully and knowingly falsifying, concealing or covering up 'a *material* fact.' On the other hand, the part here involved, without expressly mentioning materiality, prohibits 'any false, fictitious or fraudulent statements or representations.' We think, however, that this highly penal statute must be construed as requiring a material falsifica-

tion. The legislative purpose strongly implies that only material false statements were contemplated, i.e., statements that could affect or influence the exercise of a governmental function. That purpose, as expressed by the Supreme Court in United States vs. Gilliland, was 'to protect the authorized functions of governmental departments and agencies from the perversion which might result from the [fol. 1098] deceptive practices described.' No perversion of a governmental function could possibly result from a false statement that was incapable of affecting or influencing such function. And the greater weight of authority in the federal courts supports the view that materiality is an essential element of the offense described by Section 1001. The Government does not deny that proof of materiality is essential under Section 1001. Instead, it argues only that 'the false representations were material.'"

So, that speaks for itself as far as the rule of evidence on materiality is concerned, and also as indicated by my emphasis on that next to the last sentence in that very case the Government did not deny that proof of materiality is essential under Section 1001 and argued that in the particular case on the evidence the false representations were material and just to complete the record on this case of what happened. The Court went on after saying what I have quoted to examine the evidence and disagreed with the Government on its conclusion from the evidence, and the Court concluded in the particular case the false representations were not material. But that part on the evidence, of course, is irrelevant here, because there can't be any dispute that there is not a word in this record on the basis of which the Government can argue as to materiality. That is our argument, your Honor.

Mr. Kelley: Your Honor, regardless of whether materiality has to be proved or not as an essential element, first, let me say the statute, the part that we indicted under doesn't contain that word. In fact, it is in there and can very easily be construed as being surplusage, but we have proved materiality by showing that had the affidavit not been filed the Mine-Mill Union could not have used the facilities of the National Labor Relations Board. That shows that it was a material false representation.

Now, if we had attempted to put a witness on the stand to say that this statement, this false statement was material, counsel would have objected either that we were invading the province of the jury, that that was a conclusion they would have to draw from all the evidence, or he would have objected that it is something that the Court has to determine as a matter of law, and we feel that the fact that—but for the fact that the alleged false representations in the affidavit had not been executed by the defendant they could not have used the facilities of the National [fol. 1099] Labor Relations Board. That it seems to me shows that it was a material false representation.

This case came up in Fisher vs. United States, 231 Federal Second, page 99 at page 102, and this is what the Court of Appeals of the Ninth Circuit I believe it is had to say on the point: "The Government contends that 'materiality' is not an essential element of the crime of filing a false written document but that the term applies only to the first section of 18 U.S.C. Section 1001 dealing with making a concealment of a material fact." And they cite U. S. vs. Lange, District Court case, Southern District of New York, and a District Court case in Pennsylvania.

"The language of Section 1001 seems to justify such a construction. However, even if an opposite construction is taken, appellant has not alleged that this defect in the indictment was prejudicial nor has he made any showing to this effect. Appellant knew the materiality of his statement. The statements ultimately proved were certainly material. If this is error, it is harmless error under Federal Rules of Criminal Procedure 52 (a) 18 U.S.C."

And we think the same thing prevails. This also was a non-Communist affidavit case out in the District of Washington, Western District.

The Court: What do you mean by proof of materiality, what do you mean in the way of proof? I think the record supports what Mr. Kelley said about what the proof is here with respect to this matter. What do you mean by proof or you said something about the Government proving it in a couple of cases that you mentioned, what do you mean by that?

Mr. Witt: All right, sir, may I take Mr. Kelley's argument in order? I have notes, and I will include that which I was intending to do.

The Court: All right.

Mr. Witt: I tried to follow Mr. Kelley very closely on this. Taking his first point, as I followed it, he said the allegation of materiality in each of the counts at worst was surplusage. Our answer to that, your Honor, is that [fol. 1100] that may well be under the cases although, as I said, as I see the cases, there is a split as to whether it has to be alleged, but the point on this is by alleging materiality in the indictment the Government deprived us of an opportunity to argue that its absence was fatally defective under the Rolland case. We didn't make that argument, your Honor.

In the Gold case, as I recall, although I may be mistaken, I think counsel made the argument addressed to the indictment on a motion to dismiss that it was fatally defective in failing to allege materiality, but, be that as it may, Mr. Kelley at this stage of the game doesn't have the argument that that can be regarded as surplusage, because we were deprived of a basic position on a motion to dismiss both before the first trial and before this one. Secondly, Mr. Kelley said that in any event as proof here, however you put it, because unless Travis' affidavits as well as the other affidavits in the filings under 9 (f) and (g) were accomplished, Mine-Mill could not have used the facilities of the Board, but that is highly speculative. This is a criminal case, and, if we are right, this record as part of the Government's case has to show that during the year from December of '51 to December, '52, and the year from December, '52, to December, '53, Mine-Mill did use the facilities of the Board.

Your Honor, in case it has slipped your mind or you are not thinking of it at the moment you will recall that Section 9 (h) makes these affidavits effective for only one year so that, if we are right, the Government had to prove as part of its case that the facilities of the Board were used with respect to the first affidavit during the period from December of '51 to December of '52, and with respect to the second affidavit during the period from December, '52, to Decem-

ber, '53, and there isn't a word in the record that Mine-Mill used the facilities of the Board during those two years.

Now, again, I come back to the stipulation in the first case which took care of that problem which we have given to the prosecution and which became a part of the evidence in the case and to the fact that Mr. Kelley asked us for a similar stipulation on this occasion to take care of the problem, but for some reason or other it didn't become part of the evidence.

Now, it is true that, for example, in my cross examination [fol. 1101] of the witness Mason I asked him about an NLRB election in March of 1954, and he was permitted to answer over objection I think, but all that shows is that the NLRB was on the ballot in March of '54, but it is not proof that Mine-Mill was on any ballot or filed charges or participated in representation cases during the two years in question. All that evidence shows is that for the year encompassed by March, 1954, probably in the year beginning December in '53, Mine-Mill was in compliance and used the facilities of the Board.

In the third place, Mr. Kelley says, if they put on a witness, we would have objected. Well, that just doesn't add up at all, your Honor. If we had refused to give Mr. Kelley the stipulation I referred to and that we gave him in the first trial, then, of course, Mr. Kelley's only alternative would have been to call a witness from the NLRB the way the Government did in Jencks, because in Jencks they either didn't ask us for a stipulation, or, if they did, we turned it down, and I am coming to that in a moment, your Honor, in answer to your question. I will give you the references in the Jencks record where the Government proved it by an official employee of the NLRB. I will also refer to so much of the Gold record as we have in answer to your Honor.

Finally, as far as the Fisher case is concerned the very quotation that Mr. Kelley read demonstrates that the Court there was dealing with pleading in the indictment and not with proof. If there is any doubt about it, I examined that opinion very carefully especially the section Mr. Kelley read, and I have examined the two District Court cases which the Court referred to. If there is any ambiguity in

that Fisher opinion and in both cases I have them summarized in my notes, Mr. Kelley has them in the official opinion, both cases deal with this question of pleading and do not deal with the question of proof, and both cases are among the cases which take a position contrary to the Rolland case and other cases on the matter of pleading and have nothing to do with proof.

Now, as far as the references in the Jencks case go, your Honor, give me half a minute. I will find the references in the testimony of this NLRB person and in an exhibit. The Jencks case the Government called Mrs. Elsie Perryman at page five of the printed record in the Supreme Court, and she testified that she was the Office Manager for the NLRB in the El Paso office. Just again for continuity in [fol. 1102] the case in case anybody has forgotten, your Honor, Mr. Kelley will agree, that when the filings by a local union officer as Jencks was, he being an officer of Local 890, and it is in connection with his affidavit as President of Local 890 that he was indicted, the procedures of the NLRB require that the affidavits and the other documents required be filed with the Board's local office, but that, if the affidavit is by a national officer, it is filed with the National Office of the Board in Washington. So, Mrs. Perryman was produced in order to give testimony on this question among others as the Office Manager for the NLRB in El Paso.

Then, the Government used her to put in all the necessary documents including the affidavit and the other things we have stipulated to in this case, and among others she identified and gave testimony about Government's Exhibit 13 which was identified on page 12, all these page references are in the Supreme Court record, and at page 23 she was questioned about it, this, of course, is on the Government's case by the prosecutor, and I will read this into the record: "Question: As a result of that compliance did Mine-Mill take advantage of the Taft-Hartley Act during the year 1950?" There was an objection; it was overruled. "Answer: They used the services of the Board, yes, sir. Question: Now, what is G-13?" He hands the document to the witness. "Answer: It is NLRB Form 601 Charge Against Employer filed with our office. Question: What does that mean to

us Laymen, Mrs. Perryman? Answer: It is a charge filed by Local 890 against employer Empire Zinc Company alleging violations of Section (a), Subsections 1 and 5 of the National Labor Relations Board. Question: Is that in compliance with the Taft-Hartley Act?" And then there is an objection, and then the witness answers on page 24: "Yes, sir." Then the exhibit itself will be found on 406, and it is as the witness testified an NLRB form with that number that she gave entitled "Charge Against Employer" dated October 28, 1950, signed by Clinton E. Jencks, President of Local 890, and I gave you the date, your Honor, to indicate or to emphasize the point I made a few minutes ago that the use of the Board has to be shown.

The Court: Doesn't the record here show substantially the same thing?

Mr. Witt: May I just finish the sentence?

[fol. 1103] The Court: All right.

Mr. Witt: That the record has to show as part of the proof that the Board was used during the life of the affidavit in connection with which the defendant was indicted. So, I gave you the date of this charge as being October 28, 1950. The record in the Jencks case will show that the affidavit was dated April 28, 1950. Now, again, I say in anticipation of what you are about to ask that the record in this case does not show by stipulation or otherwise any use of the NLRB by Mine-Mill during the period, the 2-year period from December, '51, to December, '53.

The Court: Well, I had the impression it did in the testimony of someone, was it Mason or who?

Mr. Kelley: The cross examination of witnesses showed that, but, your Honor, I don't think that is important.

Mr. Witt: I do not think we should pass that. I think that is important. I don't think Mr. Kelley should make these statements without backing them up.

Mr. Kelley: I wish you would follow that. I would like to start that right now. That is a good idea.

The Court: I just asked the question.

Mr. Witt: I do not think Mr. Kelley gave you an exact answer.

Mr. Kelley: Your Honor, here are two of the things that are material at this point: "It is further stipulated that the

International Union of Mine, Mill & Smelter Workers filed with the National Labor Relations Board and the Department of Labor all other documents required by law for compliance with Sections 9 (f, g and h) of the Labor-Management Relations Act of 1947."

"It is further stipulated that the making and filing of an affidavit of the Non-Communist officer is a matter within the jurisdiction of the National Labor Relations Board and that the National Labor Relations Board is an agency of the United States." Those appear on page 31.

[fol. 1104] Mr. Witt: No dispute.

Mr. Kelley: Now, the materiality of the false statement is not affected one way or the other by whether or not they actually used what they have obtained. They obtained the right to use the facilities by reason of this affidavit and the other things, and, so, it was as far as the law was concerned, everything had been done to entitle them to that use. So, that, it seems to me, is as far as you need to go on that.

Now, also, the letter which was read into evidence from the Board states that they were in full compliance, and I will get it so I will be absolutely sure of it.

Mr. Witt: We don't contest that. The two letters, Exhibit 3 and 6—

The Court: All right, get the letter.

Mr. Kelley: Exhibit No. 3, which is a carbon copy of a letter dated January 8, 1952, addressed to Mr. John Clark, President, International Union of Mine, Mill & Smelter Workers, Suite 412, Tabor Building, 16th and Curtis, Denver 2, Colorado: "Dear Mr. Clark: This will acknowledge receipt of your letter of December 21, 1951, enclosing compliance material submitted in accordance with the filing requirements of Section 9 (f), (g) and (h) of the Labor Management Relations Act, 1957.

"The National Labor Relations Board will consider your organization in compliance with Section 9 (f) and (g) of the Act until June 30, 1952, and under Section 9 (h) until December 7, 1952, provided there are no intervening changes in your officers. Our Regional and Sub-Regional Officers have been notified of your renewal of compliance. This, of course, does not cover your local organizations. Each local

must separately meet the above filing requirements of the Act in order to enjoy its benefits. We will give you 30 days advance notice," and so forth.

Then, there is substantially the same letter in reference to the affidavit for the following year. So, it shows that on its face that it was acted upon by the National Labor Relations Board, and, had it not been filed, they would not have gotten this application. Therefore, it is material, it [fol. 1105] shows also nothing further is required. They had gotten all that they needed as far as the Government was concerned when they filed the affidavits.

Mr. Witt: If the Court please—

Mr. Kelley: There is one other thing I would like to say because of Mr. Witt's argument. He said by alleging materiality that we had deprived them of an argument, and then he goes on to point out that they agreed the last trial that this matter was material and they stipulated as to it, and they were ready to stipulate at this trial and say that we have now overlooked it, but they want, they are ready to concede it up to the point of our resting, but then they claim they have been prejudiced by it. It is sort of a specious argument it seems to me.

Mr. Witt: Well, if the Court please, I do not know what Mr. Kelley is trying to say so I won't try to answer it, but Mr. Kelley is wrong, absolutely wrong.

Mr. Kelley: In your opinion.

Mr. Witt: Well, of course, in my opinion.

The Court: He is arguing this point. Proceed.

Mr. Witt: In Mr. Deikman's opinion too. When he says all we need do is show compliance, that was done in the Jencks and Gold cases, and they went on and showed materiality, and it was shown on the first trial here. He doesn't dispute the fact that he asked for a stipulation in the second trial, and I again refer the Court to the stipulation on page 18 of the typewritten transcript of the first trial, that after Mr. Kelley put in his six exhibits and after they showed there was compliance the prosecution, Mr. Kelley individually personally felt it was necessary to put in this other stipulation to the effect that the International Union of Mine, Mill & Smelter Workers "used the facilities of the National Labor Relations Board." We had been good

enough to give the prosecution that stipulation in the first case, we agreed to it in this case, because we didn't see any point in burdening the Government with bringing people from Washington, contrary to the lack of cooperation the Government has shown us in getting our proof in. We don't [fol. 1106] fuss about things we don't think it is necessary to fuss about. But in any event, Mr. Kelley's own handling of the first trial demonstrates that he thought it necessary as part of the Government's proof to show that the Board was used beyond merely compliance.

Now, your Honor, I didn't finish answering your question about the Gold record, and I just found my notes. Now, we don't have the entire Gold record here. I would have had it if I thought this question would have come up, but, if there is any problem about it, we can get it, perhaps the Government has it here, but what we do have is the Government's opening statement as to what the Government would prove in that case, and we are sure that the Government proved on this particular point, they said in their opening statement they would prove. This will be found beginning on page 103 of the appendix to appellant's brief on appeal, and this is the record that was used both in the Court of Appeals and in the Supreme Court, and I will take the liberty, your Honor, I am sure you would want to have this, of reading from the Government's opening statement. After discussing the Government's proof or what the Government would make on proof of compliance along the same lines here the prosecutor went on to say, it is Mr. Lowther at the bottom of page 103: "We intend to show further that on the basis of the filing of this affidavit not only were the Board facilities available but were used in fact by locals affiliated with the International Fur and Leather Workers Union within the year ensuing from the date of the affidavit." Well, that is sufficient to show—

Mr. Kelley: All that proves, your Honor, is it was done a different way a different time.

Mr. Witt: The different way is the critical thing we are talking about.

The Court: Here is what the record here shows without any question, that the facilities were available, that letter you just read from—

Mr. Witt: No question about that, but, again, I want to come back—

The Court: You are contending that in addition to showing that the facilities were made available by the filing of [fol. 1107] the affidavit that they had to show there was an actual utilization of that service.

Mr. Witt: Right, during the period in question.

The Court: I do not believe that is the law, because, if that was the law in an ordinary false claim, I mean false claim for money or something of that sort to induce the Government to act, they discover the fraud before the money is paid, I think there are numerous cases that hold in that set of circumstances under 1001 that there is an offense established.

If you mean that, for instance, in a case like this that the fact that the union after filing the affidavits never availed themselves of the benefits of filing that they committed no offense of filing a false affidavit—that is what it amounts to—I do not agree with that at all.

Mr. Witt: No, sir, we don't say that, your Honor. We say the case that you put is different. We say the cases hold particularly the Rolland case which holds it as to both pleading and proof and particularly the Freidus case as well as the Government's own course of conduct in the Gold, Jencks, and on the two trials in this case that that material shows conclusively that both the Government and the Courts are in agreement that use of the facilities of the Board is an essential element of the Government's proof.

The Court: I do not believe that is the law. So, on this phase of the thing the motion will be denied. Now, we can take a little recess on this argument and come back on this sufficiency of evidence business.

(A recess was taken.)

After Recess

The Court: All right, Mr. Witt.

Mr. Witt: First, this one matter in connection with the materiality point, your Honor. I want to say again that Mr. Kelley is mistaken when he says that there is evidence in the record that Mine-Mill used the Board from December,

[fol. 1108] '51, to December, '53. If Mr. Kelley has any particular evidence in mind, he should refer us to it.

Mr. Kelley: In view of the Court's ruling that he didn't take that into consideration in regard to it I have made no check of the record. I have nothing further to say on it. The record has been misquoted rather freely, and we haven't indulged in the practice of correcting any statement. So, I pass.

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[fol. 1113] The Court: * * * I am satisfied there is sufficient evidence to take the case to the jury, and, therefore, the motion for acquittal will be denied.

* * * * * * *

[fol. 1118] In-Chambers

COLLOQUY RE INSTRUCTIONS AND OBJECTIONS

The Court: Counsel and the Court had an informal discussion this morning relative to the instructions to be given in the case, and in connection with that discussion counsel exchanged some instructions they wished to offer and also gave the Court copies of the instructions they wished to tender in part. This case was tried once previously and taken to the Court of Appeals and reversed, and among other things the Court of Appeals suggested that the instruction relating to membership in the Communist Party should be made more specific, commented upon the matter at some length in the opinion, and, so, I first will pass to that matter.

The Government tendered proposed form of instruction consisting of four pages entitled "Instruction on Membership" I have concluded to give this instruction in substance as tendered by the Government. I expect to do a little editing on it to make it to conform to my manner of expression in some particulars, and I also think there are probably a few places where there may be some matter that is repetitious or statements contained in the general instruction, but in substance I propose to give the instruction on membership tendered by the Government.

Now, the defense may make such objections as they think proper for the record. If you wish me to pass on your in-

[fol. 1119] structions so you can do it all at once, I can do that. Which way would you prefer?

Mr. Witt: Why don't you do it all at once?

The Court: Well then, the defense has tendered two instructions relating to this matter of membership. With the permission of counsel for the defendant I will now mark the first of those instructions as Defendant's requested Instruc-struction No. A. That instruction begins, "You are instructed that the defendant's admitted membership in the Communist Party before August, 1949, did not," and so forth. I struck out the "S", Mr. Witt, on the word "Instructions".

The Court refused this instruction on the basis that a portion of it is already covered by the instruction I propose to give on membership, and the remainder of the instruction which discusses specifically the testimony of the witness Eckert I think is argumentative in form and would be confusing to the jury without the statement of the contentions of the Government with respect to his testimony. The Court as a matter of fact as a general practice refrains from giving instructions directed to specific testimony unless, of course, the circumstances absolutely require first to instruct on abstract principles of law. I think this instruction, as I say, is argumentative in form and particularly as mentioned on pages 2 and 3, and I believe the portions that are proper as I have indicated are already covered by the instruction that I will give on the question of membership.

Now, the defendant has also tendered an instruction which I will mark with your permission as Instruction No. B as tendered Instruction No. B which reads at its beginning, "Membership in the Communist Party is a formal relation between an individual and the Communist Party which is defined by the rules and regulations of the Communist Party." That is the beginning sentence of the instruction. I also will not give this instruction in the form tendered. I think the instruction is general, and the specific instruction on membership which I have indicated I would give covers the proper features of the instruction, and a good many of the statements contained in the instruction are I think duplicated in effect by statements in the instruction to be given. So, that instruction will also be refused.

Now, I think those are the only two instructions that the [fol. 1120] defendant has tendered relative to this membership matter.

Mr. Witt: Yes, your Honor, thus far except we will have one more related to it but also related to the problem of affiliation, so, I do not think we need bother now.

The Court: You can offer it later. You may at this time state any objections you have to the giving of the Government's instruction which I have identified and also to the refusal of your Instructions A and B.

Mr. Witt: What did you call the Government's instruction?

The Court: I didn't call it any number. I don't designate numbers for instructions when I give them. I referred to it their tendered instruction on membership which you have a copy of I think.

Mr. Witt: Yes. If the Court please, at this time may we reserve our objection to the instruction the Court will give until we see it? We take it the procedure will be after your Honor disposes of these tendered instructions that we will see your Honor's proposed instructions and will be able to make objections to those as well. So, we reserve that on this issue of membership.

The defendant objects to the refusal of the Court to give Defendant's requested Instructions A and B and further objects to the instruction on membership tendered by the Government in so far as it embodies the 11 indicia from Section 5 of the Communist Control Act of 1951. We say that section and the 11 of the 14 indicia listed in Section 5, the 11 which the Government has included in its requested instruction violate the First Amendment to the Constitution, the Fifth Amendment to the Constitution, and the Sixth Amendment together with Rule 7 of the Criminal Rules.

Secondly, we object to the Government's request, because even if aside from the 11 indicia the request contained appropriate principles of law the 11 indicia undermine those and render what would otherwise be correct and appropriate meaningless, improper, and unconstitutional. And finally, we object to the Government's requested instruction, be- [fol. 1121] cause it doesn't embody the thought expressed in the last paragraph of Defendant's requested Instruction

B concerning the Defendant's belief as to whether he was a member at the time he filed the affidavits.

The Court: Is that all you had to say?

Mr. Witt: Yes. Would you mind so we will understand the procedure you are pursuing, as I said, we gather that after your Honor furnishes us copies of your instructions we will have an opportunity to object more specifically.

The Court: No, I ordinarily do not furnish copies of the instructions. You will have an opportunity, of course, before the case is submitted to the jury to object to instructions after you have heard them given in the courtroom.

Mr. Witt: All right, sir.

The Court: But to do away with that delay, which is kind of awkward, I mean we get the instructions given and then let the jury remain there in the box and have to come in chambers or something, my general practice is, and I can do that I think in the morning, is to read to you this particular instruction the way I propose to give it. I will have it ready by then, and, if you wish to make any objections, you can then, and then the objections after you hear them in the courtroom can be just limited to additional objections. That is the way we generally do it.

Mr. Witt: When did you say you would read them to us?

The Court: I think I can probably have it, as I say, I expect to edit it a little bit. I noticed what I thought—it may not be true, some repetitious statements about burden of proof and that sort of thing, and then also I think I will try to put a paragraph in to connect it up with the context of the others, but outside of that it will be in substantially the form there, maybe a word change or something like that.

Mr. Witt: You said something about reading it to us.

The Court: I said usually when I get it prepared, which, of course, I could have it prepared before morning before [fol. 1122] the arguments start, I can read it to you and you make any additional objections you want to. As a final safeguard you have a right to object after the instruction is given and before the jury retires you see.

Mr. Witt: I understand that.

The Court: We maybe can let it go this way. We just generally do that in the interest of saving time, so to speak. But anyway, you will have an opportunity to make formal

objections more complete than you have made now at the present time. In addition to this instruction on membership we have just been discussing the Government has tendered an instruction which is entitled "Instruction on Affiliation". The Court of Appeals in the opinion in this case in effect, not in effect but expressly approved the instruction given by Judge Breitenstein in the first trial on this subject of affiliation.

The Government has tendered an instruction on affiliation which is in substantial conformance, as I understand it, with the instruction Judge Breitenstein gave but adds I think a paragraph or something relative to the burden of proof and so forth. I propose to give this instruction on affiliation as tendered in substance. I do not think in that one there will be any word changes made at all. I do not think that is quite accurate. I think possibly the way it reads now the first paragraph has been stricken in the tendered instruction, and it starts out with the word "affiliated" and so forth. I think possibly it would be proper to add there, "Affiliation as used in Counts 2 and 5 is not the same as membership". I am adopting the language of the defendant's instruction in that respect. Possibly there will be some changes along that line just in context, but it will be given in substance.

Now, the defendant has requested an instruction on this subject of affiliation which for purposes of reference may be designated as Defendant's requested Instruction No. C. This instruction reads beginning with the first line, "Affiliation as used in Counts 2 and 5 is not the same as membership." The Court will refuse Defendant's Instruction C, first, on the ground that the proper material in the instruction is already incorporated in the instruction which the Government has tendered and which the Court will give on this question of affiliation.

For example, the second sentence of the tendered instruc- [fol. 1123] tion is covered almost expressly in the same language in the Government instruction in the next paragraph in its entirety. I think without comparing it word for word it is included in the Government's instruction. Counsel advises that the last paragraph on the first page of the tendered instruction starting, "Whether intermittent or re-

peated the act or acts tending to prove affiliation" and so forth, as well as the first paragraph on page two of the tendered instruction taken from the language of Justice Douglass in the case, I don't recall the title—

Mr. Witt: Bridges vs. Wixon.

The Court: My own conclusion is that that principle is not involved in the present case, and I think it would be a mistake to instruct the jury on that principle. I am also advised by counsel that the last paragraph on page two is taken from an opinion in the case of—what case was that, Mr. Witt?

Mr. Witt: The opinion of Chief Justice Vinson in ACA vs. Douds.

The Court: I do not believe that that principle is applicable here or that the giving of the instruction in the form tendered would be proper. I wish to expressly ask the Government with respect to this instruction, what objection they have to the incorporation of paragraph 4 which starts, "Mere cooperation with an organization does not establish affiliation." It has been given in connection with membership instructions, and I do not know, I thought I might include that sentence but I am not sure.

Mr. Kelley: I think our primary objection to it, your Honor, is that it is only partially true. You would have to add to it something like this: That, "However, these things that are mentioned taken together with other acts on the part of the defendant could be used to establish affiliation." It is only a halfway statement; it is not a complete statement, and it might mislead the jury.

The Court: I was just a little bit fearful of it. I think it is covered properly in some principle in the second paragraph of the instruction you have tendered. So, I guess I will not include any of that part in the instruction that I [fol. 1124] will give. Do you wish to make objections to either the giving of the Government's instruction in substance or the refusal of your instruction?

Mr. Witt: Yes, sir.

The Court: All right.

Mr. Witt: If the Court please, we object to the Court's refusal to give Defendant's requested Instruction No. C respecting affiliation on three grounds: One, because the

Government's request does not include that paragraph just referred to beginning with—which is the fourth paragraph on the first page of Defendant's requested instruction beginning with the words "Mere cooperation"; number two, on the ground that the paragraph beginning on the bottom of the first page and including on the second page of Defendant's requested instruction beginning with the words, "Whether intermittent or repeated," should be given on the basis of Mr. Justice Douglass's opinion in Bridges vs. Wixon; and on the third ground that the Government's requested instruction does not embody the last paragraph of Defendant's request relating to defendant's belief at the time of signing the affidavits which we believe is called for by the opinion of the Chief Justice, the late Chief Justice in ACA vs. Douds.

Then we also object to the last two paragraphs in the Government's request which your Honor has indicated you will give together with the rest of the Government's request on this issue. We object to the penultimate paragraph in this request referring to circumstantial evidence because of our position with respect to the perjury rule. In the event this cuts across other instructions may we say generally now that—

The Court: I was going to reach that instruction next, but you can proceed.

Mr. Witt: Just to finish this point so we will cover it in case we miss it elsewhere in your Honor's instructions, as indicated in the defendant's request your Honor is about to come to on the conventional principles and our position that the perjury rules are applicable that circumstantial evidence merely stated in the form it is in this penultimate paragraph of the Government's request on affiliation is improper.

[fol. 1125] Then on the final paragraph in the Government's instruction we object to it, because it destroys the effect of the rest of the instruction, and, unless I am mistaken, that thought expressed in that paragraph, the paragraph in haec verba or the substance of it was contained in Judge Breitenstein's charge which Judge Lewis's opinion approves.

The Court: I didn't get the significance of that last statement.

Mr. Witt: This last paragraph of the Government's request on affiliation, your Honor, beginning with the words, "In determining the issue".

The Court: Yes.

Mr. Witt: We say that the way that is expressed that destroys the effect of the principles stated otherwise in the Government's instruction, and we say further on that paragraph that it wasn't contained in Judge Breitenstein's instruction on affiliation which the Court of Appeals approved.

Mr. Kelley: The Government concedes that, your Honor, that this last paragraph on page two of our tendered instruction was not given at the last trial. However, in the Bryson case it was given.

The Court: In what case?

Mr. Kelley: Bryson. That was in the Ninth Circuit, and certiorari was denied in that case, and that was the reason we put it in there. We don't feel strongly about it one way or the other.

The Court: When I read it over I concluded to leave it in, but on the face of the objection made here I think I am going to exclude it on this basis that gives me a little concern: These indicia of membership which are included in the instruction on membership which in Section 5 of the Communist Control Act of 1954 are specifically referred to in the Court of Appeals opinion as relating to the matter of membership. Of course, the jury will be instructed that affiliation and membership are two separate things, and I am a little bit fearful of some notion by this statement here [fol. 1126] which gives the jury the right to consider in considering the question of affiliation the matters of evidence suggested to be considered in arriving at your finding on the issue of membership. It might confuse them about the question, so, out of an abundance of precaution I think I am going to strike that last paragraph, and I will not give that last paragraph on this instruction.

Mr. Witt: In view of that may we confer for a moment?

The Court: All right.

Mr. Witt: Your Honor, in view of your Honor's ruling striking out the last paragraph of the Government's proposed instruction on affiliation we wish to make this further

point which cuts across both the membership instruction and the affiliation instruction: Even if the instruction on affiliation were otherwise proper or, in other words, even if your Honor gave our requested instruction on affiliation, our Instruction C, if your Honor is going to give the substance of the Government's instruction on membership, at least, if your Honor is going to give an instruction on membership which embodies the 11 indicia, any of the indicia from Section 5, we say that embodying any part of Section 5 and the membership instruction also destroys what would otherwise be a good instruction on affiliation for the simple reason that even at best it is almost impossible for a jury to consider the evidence in a case like this and particularly the evidence in this particular case and make a distinction between what is evidence of membership and what is evidence of affiliation even if you had the most beautiful instructions on those two words you could imagine. The injection of Section 5 or any part of it into the membership instruction makes the distinction between membership and affiliation impossible even to the most learned and subtle of jurors.

The Court: The Court of Appeals didn't seem to share that apprehension, because in the opinion they approved the instruction that was given with respect to the definition of the word "affiliated" and relating to affiliation and then proceed to specifically, as I understand the opinion, require that these indicia of membership that we have been talking about be included in the instruction relative to membership.

Mr. Witt: We understand. We think your Honor is bound by that opinion, but we are objecting.

[fol. 1127] The Court: I understand that, but I wanted to get this in here. Now, as I understand, this instruction in its present form is like the instruction that was given in the other case.

Mr. Kelley: Yes. What is left now is exactly the same.

The Court: One other thing that won't appear because I am giving the instruction, there is nothing in the record to show what part was deleted. So that the record may show the sentence that the Court has omitted it reads as follows:

"In determining the issues as to whether the defendant was or was not affiliated with the Communist Party at the time alleged in the indictment, you may take into consideration any statement made or acts done by the accused, and all other facts and circumstances in evidence which may aid determination of the issues, including any matters of evidence suggested to be considered in arriving at your finding on the issue as to membership."

Now then, the defense has tendered another instruction which for convenience or information or for identification I have identified as Defendant's requested Instruction No. D. This is in the first paragraph of the Defendant's requested conventional instructions regarding the presumption of innocence—the burden of proof and reasonable doubt and the inference that is to be drawn from the fact of an indictment.

Mr. Witt: Et cetera was left out right after the word "indictment"—etc.

The Court: Those would be the basic general instructions and, of course, will be given, but the tendered instruction expressly requests that the usual instruction about circumstantial evidence be omitted and that the jury be instructed that the so-called perjury rules of evidence are applicable to this case, and then the instruction proceeds to set out what would be applicable to be applied in a perjury case. In other words, the defense seeks, as I understand their position, to have made applicable to this case the same rules with respect to the sufficiency of evidence that are required in a perjury prosecution. This matter has been discussed in several cases, and as I understand, the accepted rule is that these, in these cases under Section 1001, Title 18, they do not come in the category [fol. 1128] of perjury cases and that the degree of proof required in a perjury case is not essential to establishing guilt in a case under 1001 and for that reason this tendered instruction will be refused.

Mr. Witt: The defendant objects to the refusal of the Court to give the jury instructions as requested by the defendant in his requested Instruction No. D, that the perjury rules of evidence are applicable to this case.

The Court: Now, that completes the instructions which have been duly tendered and offered, as I indicated in our general discussions here, some of which at least were off the record, that in light of the fact that the Court of Appeals without any express declaration to that effect but in effect, nevertheless, have approved the other instructions given at the time of the first trial with the exception of the instruction relating to the subject of membership the Court proposed to use the instructions given in the first trial of the case by Judge Breitenstein. Now, I have prepared for myself here a copy from the record of the instructions given. I assume counsel have available to them or here the record or copies of the instructions that were given by Judge Breitenstein, and it has occurred to me that probably the most expeditious way of proceeding would be to find out now by looking at these instructions what if any objections there were to the instructions as given, and then, if there are any additional areas where instructions would be considered, we can consider them. Do you have a copy of the old instructions?

Mr. Kelley: They are in Volume XIII.

The Court: I hesitate to read them through. I thought if you could get them and counsel could read them as they were given and then when we come to a place where you think there should be some comment, why that you can do it that way.

(A recess was taken.)

After Recess

The Court: Have you looked over the instructions that were given before?

Mr. Witt: Yes, sir.

[fol. 1129] The Court: I am referring now to Defendant's requested instructions that were handed to me just before the last recess which have not been mentioned for the record before now. I think the best way to do is to number these as we go where they are refused. I will give in substance the instruction which reads, "You may have been inconvenienced." I am going to give that in substance.

Mr. Kelley: That will be "E"?

The Court: The refused instructions are all that we need to number. This one will be given. I will mark it given in substance. I am going to elaborate on it a little more.

Mr. Witt: Let the record show that we leave this to your Honor's discretion.

The Court: The next one I come to is one that starts out in relation to the Taft-Hartley Act, "As I instruct you during the course of the trial compliance with Taft-Hartley," and so forth. Have you found that?

Mr. Kelley: Page 1458 that is covered.

The Court: I was going to say in the instructions that were given and which I propose to give they covered this subject.

Mr. Witt: That is the one we had stipulated on in the first trial, isn't it?

The Court: No. I was going to raise the question I do not know whether I will deny this or give it. I have it on mine, I do not know the page number in the record.

Mr. Kelley: 1458. It starts out, "The Labor Management Relations Act."

The Court: It starts out, "The Labor Management Relations Act," if you can find that place. The question I have is whether your tendered—I propose to give that instruction that was given to me. It seems to me yours except for maybe one sentence or something like that is just substantially like the one that I intended to give.

[fol. 1130] Mr. Witt: Give me a half a moment.

The Court: Yes.

Mr. Witt: Yes, I do not think we should have a problem on that. We think you should add not one sentence of ours but two. Ours has three sentences. Judge Breitenstein's paragraph takes care of our first sentence, but we think that you should add at the logical place or places in Judge Breitenstein's paragraph the two remaining sentences in our request.

Mr. Kelley: May I say something on that, your Honor?

The Court: Yes.

Mr. Kelley: What this in effect is doing is stating in a negative way the elements of the offense. In prior instruc-

tion or instructions the Court sets forth what the elements are that the Government has to prove, and this is merely saying that certain things do not constitute proof, and this has been given as a precautionary instruction substantially in the language suggested in the defendant's request, but it might be confusing to tell them what the elements are in one instruction and then tell them that certain things aren't evidence in another, and I think the way it is covered in the instructions at the last trial, which appeared on page 1458 of the transcript, covers the situation adequately and fairly.

The Court: Well, the only modification I can see in Judge Breitenstein's instruction that I think would fully cover the point they are raising is to add in the body of the instruction there the way it was given, "The law does not compel the filing of such an affidavit," and then I would say something to this effect, that there is nothing wrong or illegal in not complying with that provision of the statute and then stop and let it read like it is the rest of the way, because in the instruction tendered, why, there is no evidence that there are labor organizations which have not complied with Taft-Hartley. I don't think there are.

Mr. Witt: Yes, there are.

Mr. Kelley: There isn't any evidence in this case.

[fol. 1131] Mr. Witt: I thought your Honor was asking just as a matter of information. I think what your Honor said would take care of our second sentence.

The Court: I will do that right now as long as that developed.

Mr. Kelley: That is in there—the law does not compel the filing.

The Court: I know that, but I am just going to say, "Thus, there is nothing wrong."

Mr. Kelley: I see.

The Court: Right after the sentence the law does not compel the filing of such an affidavit I would say, "Thus, there is nothing wrong or illegal in not complying with the Taft-Hartley Act in this respect," and then I would

continue, "The law already provides that the Labor Relations Board." Does anyone see any objection to that?

Mr. Kelley: We have no objection.

Mr. Witt: No, we have no objection. That takes care of the second of the three sentences in our request, but we still want to say a word about the third sentence in our request when you are ready.

The Court: I am ready right now. My own thinking is that that does not, is not accurate and also would be misleading. I do not know what you mean is evidence against the defendant. The evidence is in the case, and the case is against the defendant. It relates to a dozen other theories and circumstances, and I think it would be misleading, that particular sentence. I think the jury, you can argue it, I think the jury would be deceived at least. I have told them there would be nothing wrong or illegal in complying. I think I will refuse it. So, we will number this instruction No. E, requested Instruction No. #. (sic) I am going to say, give second sentence in substance.

Mr. Witt: The record should show our objections only to the Court's refusal to give our third sentence or a rewording of it.

[fol. 1132] The Court: The next one as I pick them up is one which I will designate as "F", as requested Instruction F which reads, "The witness William Mason was an informant for the Federal Bureau of Investigation." The subject of the consideration which can be given to the testimony of informants is covered by the instructions given by Judge Breitenstein which I propose to give again. He used the words "confidential informant", and that will read: "Some of the Government witnesses have been called informants. You can consider this fact in connection with all the other facts relating to such witnesses. It is not unusual for witnesses for the Government in criminal cases to be informants. The fact that a witness has been paid by the Government for acting as an informant whether the payment consists of reimbursement for expenses or per-diem or wages or both may be considered by you along with all the other facts and circumstances in determining the credibility of the witness."

I am refusing this instruction which singles out Mr. Mason for the reason that the general rule I have just stated is applicable to all witnesses who may be in that category and I think states the proper rule of law with respect to the consideration which can be given or should be given their testimony.

Mr. Witt: May I say a word on that for the record?

The Court: All right.

Mr. Witt: Your Honor, if I followed you, the way you would give it would be somewhat confusing to the jury, because your Honor referred to some of the witnesses and also your Honor referred to payment. It happens that the situation in the first trial was different. More than one witness was a confidential informant, and more than one witness was paid. In this case we are talking about only one witness, and there is nothing in the record to show that he was paid. We are talking about Mason. So, your Honor's formulation would be confusing to the jury. I imagine the prosecution would object to that too. It is not based on this record.

Aside from that, two points I make for the sake of accuracy and to avoid confusion, we think our requested Instruction F states the law as to the people in this category more accurately than the paragraph in Judge Breitenstein's instruction which your Honor has indicated he will revise.

[fol. 1133] The Court: Well, I don't think, I don't know of any rule of law, this almost places them in the category of an accomplice, the instruction you tendered, but I do wish to ask the Government about whether that language about payment should be in there. I recall with respect to one witness that he said he got $10.00 I think.

Mr. Kelley: That was the only evidence of any payments other than for statutory witness fees and that sort of thing.

The Court: The way to reach it would be to strike out that about the payment business.

Mr. Kelley: I think so.

Mr. Witt: I should think so.

The Court: And make it read—it is about that one witness, he was paid.

Mr. Witt: No witness was paid.

Mr. Kelley: He says no witness was paid.

The Court: He got $10.00 to pay a babysitter. Who was that?

Mr. Kelley: Gardner.

The Court: I think I will change it to read, the fact that a witness—

Mr. Kelley: —furnished information.

The Court: The fact that a witness furnished information.

Mr. Witt: As an informant.

Mr. Kelley: An informant is one who furnishes information.

The Court: Change it to read, "The fact that a witness has acted as an informant for the Government may be considered by you along with all the other facts and circumstances to determine the credibility of such witness."

[fol. 1134] Mr. Witt: May the record show that we object to it, and we object to the Court's refusal to grant our requested Instruction F.

The Court: The next one pertains to the subject I mean of the witness William Mason. It reads, "With reference to the testimony of the witness William Mason about his telephone call to the defendant in late July," and continues on. That we will mark Instruction G. I know of no principle of law that would make this instruction proper. In other words, the effect of the instruction is to say that an informant's testimony shall not be considered, and I do not think that is the law.

Mr. Kelley: That is what he wants to say.

Mr. Witt: It may not be the law now but it will be.

The Court: Now, the next one I come to is, it starts out, "The witness' testimony about what the witness said in a certain conversation with the defendant," and so forth, I think is argumentative and confusing in the form it is tendered.

Mr. Kelley: It is not a correct statement of the law.

The Court: I would be obliged to refuse it. Do you have anything to say in defense of it?

Mr. Witt: We think it is very neat and artful, your Honor. If your Honor thinks it is inelegant and some-

thing should be given, the law makes it incumbent upon your Honor to rephrase it, otherwise, you are in trouble.

Mr. Kelley: It is covered by other instructions. So far as it has any merit it is covered by other instructions I would say.

The Court: I think the substance of the instruction relates to Mason's testimony. I think the subject is Mason's testimony.

Mr. Kelley: It is argumentative.

The Court: The Court feels that this question of what they may consider and what they may not consider generally is covered by the general instructions. I think I [fol. 1135] will refuse that for the reasons I have indicated. That will be designated as your tendered Instruction H.

I do not think the next one that I will designate as "I", which reads, "In this case you have heard testimony from all the prosecution witnesses relating to periods of time before December, 1951."

Mr. Kelley: That is covered, your Honor, in the instructions of the last trial so far as it is proper.

The Court: I think it is.

Mr. Witt: May the record show up to this point that we object to the Court's refusal to give any of our requested instructions which the Court has refused to give up to this point.

The Court: I thought you had done that.

Mr. Witt: I am not sure. I think I missed the last one.

The Court: I think the matter that this instruction relates to appears in the given instructions at the last trial where it is recited, "The defendant may not be convicted of any other charges than those contained in the indictment. There is some evidence in the case that the officers of the International Union of Mine, Mill & Smelter Workers executed non-Communist affidavits in 1949 and in 1950 and that the defendant Travis was then an officer of the union. This evidence is pertinent only for the purpose of enabling you to determine the state of the defendant's mind, his intent, and whether he signed, made, and used in 1951 and 1952 affidavits knowingly and wilfully with

the knowledge of their falsity. You are not warranted in finding the defendant guilty in this case simply because you find from the evidence that he may have committed other offenses not charged in the indictment."

It seems to me that that instruction covers this problem better than the tendered instruction.

Mr. Witt: We do not think so, but may we hold that until your Honor is done ruling on our requests, and then [fol. 1136] we will go through Judge Breitenstein's instructions considering the respective problems and then consider this one at that time?

The Court: I come to one which starts out, "Under Counts 1 and 2 the defendant is charged with having made a false affidavit on December 19, 1951," and so forth.

Mr. Kelley: This raises the same point on remoteness which the Court has ruled on several times.

Mr. Witt: This has nothing to do with remoteness. This has to do with the intolerable confusion in a case like this.

The Court: What does it purport to do?

Mr. Witt: May I explain it?

The Court: Yes.

Mr. Witt: Maybe this doesn't do it as well as it might. I touched on the problem, if the Court please, in the argument yesterday afternoon when I argued the insufficiency of the evidence, and I don't want to take too much time on it now, but I will explain what we are trying to do in this request by an illustration. Take Gardner's testimony about his conversation with the defendant in October, 1951, which related mainly to what the defendant said about his resignation in 1949. It was in the sense it was admitted as evidence in the case as a kind of admission. Now, is that testimony of Gardner testimony for October, '51 and, therefore, bears on the defendant's guilt as to the first two counts with respect to December, '51, affidavit or is it testimony which goes to the good faith of his resignation in August, '49, or the can't-resign theory or what? And the same with other pieces of evidence. But I think that is a good enough illustration.

The Court: I think on the basis of that the instruction will have to be refused as being I think confusing and misleading probably in the form stated, and I don't think it

is on an accurate premise because the evidence you are talking about is evidence in the case. It is a fact and circumstance that must be considered along with all the evidence in the case, and I don't think you can isolate any portion of any witness's testimony and say that this can only be considered as applying to this period or that period. [fol. 1137] Mr. Witt: Let me say this so our position is clear: Take, again, this piece of testimony of Gardner, we have four counts in this indictment, two with respect to the year '51, the month of December, and two with respect to the month of '52, the month of December. How does this jury know how to deal with that testimony of Gardner in terms of the two sets of counts? Is that testimony that bears on the defendant's guilt in '51 or in '52 or in both years?

Mr. Kelley: Both years.

The Court: Any attempt on the part of the Court to control the inferences the jury may draw from the evidence would not be proper. Now, this instruction will be numbered "J" and will be refused for the reasons I have just indicated. The next one I pick up starts out, "Unless you find beyond a reasonable doubt that the alleged false, fictitious and fraudulent statement and representation made by the defendant are material," we will designate that instruction as "K". This clearly and obviously to the Court in the last three paragraphs does not state the law as I understand it to be. This matter came up yesterday in connection with the defendant's motion for acquittal, and this theory at that time was advanced by the defendant as the basis for acquittal, and I am satisfied that these last three paragraphs do not state the law as I understand it to be.

Mr. Witt: All right, your Honor. You just referred to the last three paragraphs. Does your Honor care to make a statement with respect to the first paragraph?

The Court: I was going to ask the Government with respect to the first paragraph. I mean you have alleged that this was a material false statement or false, fraudulent or fictitious, whatever it was, the language of the indictment. I think that is one of the elements of the of-

fense, isn't it, the materiality, under your allegations of the indictment?

Mr. Kelley: I don't believe it is mentioned. The only thing is I thought the Court had found as a matter of law—

The Court: I don't find as a matter of law. I didn't [fol. 1138] find anything. I held there was evidence that showed it was material simply. That is what the argument was about yesterday. I noticed, I am not too familiar with these instructions, that the word wasn't used in these instructions that were given at the last trial, and I think all it requires to be done is to put the word "material" in the elements of the offense, "material statement", that is the way you have alleged it in the indictment.

Mr. Kelley: Yes. Let us think about that just one minute.

The Court: Anyway, we will come back to that, but the instruction will be refused on the basis I have just indicated. The instruction as tendered will be refused on the basis I have just indicated. That is Instruction K.

Mr. Witt: You say on the basis you have indicated that you will give the first paragraph?

The Court: I said that the last three paragraphs didn't state the law as I understand it to be, and, of course, the instruction tendered as a whole I am asking the Government to check on this question about what properly should be said about the materiality allegation here, whether it is an element of the offense. We are coming back to that.

Mr. Witt: Our first paragraph is open?

The Court: Yes, we will come back to that. Now then, the next one is one that starts out, "Membership in the Communist Party is a different status than affiliation with the Communist Party." That remainder of the instruction, that same sentence I think is already included in another instruction which will be given, but the remainder of the thing gets to this question and raises in another way this question about election.

Mr. Kelley: And repugnancy.

The Court: The Court ruled on it yesterday in effect. Under the language of the Court of Appeals in the first trial of this case I think that this is a matter that will have to be considered after the verdicts are returned if there is any difficulty along that line. So, it will be refused on that basis. It will be marked as Instruction No. L.

[fol. 1139] Mr. Witt: Just one minor typographical change. In the fourth line from the bottom which reads, "Under either count," it should not be the word "counts". That should be the singular the same way as it is over here. It should be, "Under either Count 1 or 2."

The Court: Strike out the "s" from the word "counts".

Mr. Witt: Yes. We object to this one. We are not finished with "K", but I do not think I stated for the record that we also object to your Honor's refusal to charge the jury as we request—strike that. We are coming back to "K".

The Court: We are not coming back to "K". We are coming back to the principle in the first paragraph but not to Instruction K.

Mr. Witt: All right. Then I had better make the record on that. We object to your Honor's refusal to charge as requested in Instruction No. K and in Instruction No. L.

The Court: The next one I have will be marked No. M, and it reads, "With respect to each of the four counts you must find beyond a reasonable doubt not only that the statement of the defendant was false but the defendant knew it to be false at the time he signed the affidavit," and then it continues on with some other matter. Of course, the instruction given covers what the elements of the offense are in which these are included, the fact the statement was false, and this instruction in effect just isolates two of the elements of the offense, and I do not think that is proper. I think the instruction given covers the thing in so far as at least that first paragraph goes, and the next one is simply an expansion of that theory.

Now, the last paragraph I do not quite understand the purport of that.

Mr. Witt: Actually, this instruction ties in with the last paragraph in our request on membership which is Defendant's requested Instruction No. B, and the last paragraph in our request on affiliation which is Defendant's requested Instruction No. C. The last paragraph in Defendant's requested Instruction No. M gives the jury the rule of law and how you determine the mental state in this case belief.

[fol. 1140] The Court: My impression is that the instructions given by Judge Breitenstein which I propose to give,

as I have indicated, clearly pointed out the elements of the offense and the necessity of proving them beyond a reasonable doubt and all of those things and also went into considerable detail into the proof of intent and the things that surrounded that so that I think the subject of this instruction is already covered, and after we go over the Court's instructions, if you want to point out anything that is not covered, we might come back to it. I will lay it aside.

Mr. Witt: We object to your Honor's refusal to give Defendant's Instruction M.

The Court: I will come back to it, but I think, as I have indicated, it is covered in proper form by the other instructions in somewhat of proper sequence, whereas, this picks out this element and that element separate from the proper instructions. The next one I have I will designate as "N", and that reads, "The only person who is on trial in this case is the defendant Maurice E. Travis." Now, that first paragraph is very similar in language and content to an instruction I propose to give which was given at the last trial which reads as follows: "The only person who is on trial in this case is the defendant Maurice E. Travis. None of his counsel, none of the witnesses or any other persons associated with the defense are on trial. The International Union of Mine, Mill & Smelter Workers is not on trial. Many references during the trial have been made to this union. This testimony is only pertinent and admitted for your consideration as it bears on the issues here regarding the truth and falsity against the defendant Travis. The only issues for you to determine are the guilt or innocence of the defendant Travis on each of the four counts of the indictment." So, I think that first paragraph is very adequately covered. It is almost verbatim.

The second paragraph I do not think is proper. I do not quite understand what he means.

Mr. Witt: Well, you recall, your Honor, that we objected to Eckert's statement on my cross examination about the nature of the CIO hearings. So, we are just preserving our record on it in view of the fact that your Honor denied our motion to strike that piece of Eckert's testimony. We think in order to carry through our position

[fol. 1141] we have to request that your Honor charge along the lines of this paragraph.

The Court: All right. It will be denied, that particular request, and this instruction will be refused on the basis that the first paragraph is covered almost verbatim by the instructions that I will give, and that the second paragraph I do not believe states the law or is proper.

Mr. Witt: Your Honor, it is important to say another word or two on the first paragraph.

The Court: All right.

Mr. Witt: If I followed your Honor, you intend to give a charge more or less the same as Judge Breitenstein did on this problem especially since your Honor stated that you would instruct the jury that Travis's counsel is not on trial, none of the witnesses are on trial, and any other person associated with the defense is not on trial. Now, that sentence in Judge Breitenstein's instructions, which appears in the transcript of the record on appeal on page 294 was embodied because of the particular events which took place during the first trial.

You remember in connection with our motions for mistrial in connection with Eckert's testimony about the naming of counsel—

The Court: If you wish to have that sentence left out, that is perfectly agreeable to me.

Mr. Witt: Yes, because it will inject counsel on this record. Also, the situation with respect to the witnesses was somewhat different, but that is not important.

The Court: I will strike out that sentence. I didn't know the reason it was in there. It is all in the same sentence. I will strike that sentence.

Mr. Witt: That is because one or two of the Government witnesses in this case feinted a person who was helping defend, and defense counsel—

[fol. 1142] The Court: "The only person who is on trial in this case is the defendant Maurice E. Travis," and then the International Union of Mine, Mill & Smelter Workers is not on trial. That part I guess is all right. That completes the tendered instructions submitted by the defendant except "M" and "I" which I am holding out for a comment as we go through these other instructions.

Mr. Witt: I am sorry, before we get away from the record on this may the record show that we object so far as your Honor's proposed instructions are different from our request.

The Court: You asked me to hold it out or I wanted to see if there was anything in there that wasn't covered in the instructions Judge Breitenstein gave. Let's proceed to the instructions Judge Breitenstein gave which you have examined and have before you. If you will go down through them and point out anything that you think that was wrong or that you wish to except to at this time.

Mr. Witt: All right, sir. Your Honor, I am using the transcript of record on appeal.

The Court: I am using a different one, and they have a different one. The only thing we can do is go to the place you have in mind.

Mr. Witt: We will find it without difficulty. It will go continuously from the beginning to the end of the charge. First, we object to the charge on circumstantial evidence which being near—

The Court: I have found it. "The jury may convict upon circumstantial evidence as well as on direct evidence."

Mr. Witt: 286 of the record on appeal, and that is based on our motion on the perjury—or position on the perjury rule, so, I need not say anything more about it. Your Honor has in effect ruled on it.

The Court: You are objecting to it on the basis that you think the rule applies in perjury cases should apply here?

Mr. Witt: Yes.

[fol. 1143] The Court: Your objection on that basis will be denied.

Mr. Witt: Then, four paragraphs below that the so-called informer instruction, we have made the record on that. Your Honor has denied our request on that. Then quite a few paragraphs after that at page 289 of the record on appeal where Section 1001 is quoted. The paragraph being, "The Federal statute which the defendant is charged with violating is 1001."

The Court: I have found it, "The Federal statute which the defendant is charged with violating Section 1001."

Mr. Witt: You notice that only a part of 1001 is quoted, and we think this is not too important but because of our position on materiality we think that the entire Section 1001 which is not much longer should be quoted.

The Court: That is verbatim statement of 1001, isn't it?

Mr. Kelley: Well, there is just a little of it. I have got it here.

Mr. Witt: He has left out the so-called first clause which is not involved in this case.

Mr. Kelley: You think it ought to be in there?

Mr. Witt: Just to make the record complete, yes, because of our point on materiality.

Mr. Kelley: The statute reads, "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000," and so forth.

The Court: That brings up the thing that I would like to get the Government's notion on. Yesterday it came up, and it came up again today on this one instruction that we mentioned a moment ago. This indictment has that [fol. 1144] word "material" in there. What in your viewpoint is the effect of that? I mean where are we on that? I guess it was the same indictment at the last trial, and, yet, apparently this question didn't come up.

Mr. Witt: May I say since your Honor asked that question before we would like to answer that and explain why it didn't come up, your Honor. In the sense—in a sense I indicated why in my argument on materiality yesterday afternoon. On the first trial it did not come up because we stipulated as to materiality, and the stipulation as to materiality became part of the record, and, therefore, it wasn't important to us in connection with the instructions. We had conceded it, and we didn't pursue it.

Now, that, as we see it, there is no evidence in this record as to materiality we are pursuing it, and, therefore,

we think the charge which we have proposed on materiality should be given.

The Court: How would the fact you have stipulated to it change the law in any respect regarding the elements of the offense? The stipulation merely establishes a fact.

Mr. Witt: Just in this sense, your Honor. I think this will answer you. This will illustrate the best in terms of Judge Breitenstein's charge. If you will turn now a couple of pages beyond the point we are just discussing where he quoted from Section 1001 and go to the paragraph beginning, as follows, "To return now to the four elements which must exist for there to be a violation of the statute." I will wait for you to find that.

The Court: I have found it.

Mr. Witt: I am sorry, go to the two paragraphs before that one beginning in this case, "Counsel have stipulated."

The Court: I have found that.

Mr. Witt: Now, at the end of that paragraph, the paragraph which begins in this case, "Counsel have stipulated," at the end of that Judge Breitenstein stated after he stated the other parts of the stipulation that, "That the Board [fol. 1145] acted upon them," and therein he referred to that part of the stipulation which took care of materiality. Therefore, when he came to the element of the offense two paragraphs below and he referred to the four elements he found it necessary to discuss only two of them, because the other three were out of the way including materiality, and we didn't press it, your Honor, because it was a lost cause. We didn't make a fuss about it. We stipulated before trial, we did on this trial. We told Mr. Kelley, as I said yesterday, we would stipulate on it, but the difference is that in the first trial that stipulation was made part of the record, and in this trial it has not been made part of the record.

The Court: I cannot see, Mr. Witt, that would follow anything with respect to the elements of the statutory offense or of the elements in the trial. If it had been admitted as a matter of fact, that is all a stipulation is, is something that is agreed upon as a matter of fact. That would do away with the proof on the subject, but it still would say, it would remain one of the elements. For in-

stance, to illustrate what I mean, if that was considered an element of the offense, why, Judge Breitenstein in that paragraph following that, the first one you referred the Court to, would have said the materiality was conceded. There is no mention made throughout the other instructions with regard to the necessity of establishing by stipulation or proof this question of materiality, and my impression is, and I wish referring to the express language that you just pointed out here in this instruction, "That the Board acted upon them," I thought that was in the record right now, when they sent out that letter that you read yesterday.

Mr. Kelley: They were in compliance. That's right, the Board did act on it.

Mr. Witt: We argued that yesterday. We disagree with that, but just on your Honor's point about Judge Breitenstein's instructions on the elements of the offense your Honor is absolutely correct that it wasn't spelled out correctly, but to us on the first trial it was academic, your Honor, so, we didn't press it, because in the same way that we had stipulated to the whole compliance picture including the six exhibits we stipulated that the Board acted upon the affidavits which took materiality out of the case, and, therefore, when Judge Breitenstein went on to [fol. 1146] spell out the elements of the offense without referring to materiality there was no point in our fussing about it. His statement that there was a stipulation about it took care of it, and what was the use for us to ask him to be more exact? It could not do us any good in that record. But on this record we say it is entirely different, and on the specific point we just came back to we say letters of compliance do not take care of the materiality point.

The Court: It wasn't before considered to be an element. The materiality wasn't before considered to be an element.

Mr. Kelley: That's right. We think the fact that the word "material" in there is surplusage under the statute and doesn't add or subtract anything from the elements—

Mr. Witt: There is no use of renewing the argument we made yesterday. It is important, it is of the greatest importance to us on this technical point to keep making

our record at the appropriate points, and I will say again in view of that statement of Mr. Kelley, that Mr. Kelley just made, as I said yesterday afternoon that the word "material" may or may not be surplusage under the cases I referred to yesterday, but at this stage of the game the Government can't argue it is surplusage, because, if it had been omitted from the indictment, it would have been open to us to make an argument to the motion to dismiss under the Rolland case, the leading case, which holds that it is not surplusage and that it is an essential ingredient to the offense and has to be pleaded in the indictment.

The Court: What is your position about it?

Mr. Kelley: Well, your Honor, I can't see that it is any different now than it was last time under the statement by the Court. He said that we had stipulated that Travis had executed the affidavits, he had mailed them or caused them to be mailed, they were received by the Board and the Board acted upon them. That is what they did here. They acted upon them and notified the union that they were now in compliance and were free to use the facilities of the Board.

Mr. Witt: That is not acting upon them. Under what the Government, itself did, as I pointed out yesterday, on the first trial here getting this stipulation that Mine-Mill used [fol. 1147] the Board, the Government approved it beyond mere compliance. In the Gold case as we showed by argument of Government counsel, opening statement of Government counsel in the Gold case, as was disclosed yesterday from the Jencks record, the Government proved not only by a witness but by an exhibit beyond the so-called letter of compliance. So, the letter of compliance is not sufficient proof that the Board acted upon the affidavit.

The Court: I am not so much concerned about that. What my problem is and what I wanted to get the Government's position on is whether it should be said in this case that as an element of the offense it must be established that the affidavit was fraudulently materially or however it was alleged there in the indictment.

Mr. Kelley: That is what I was looking for, to see if I could find the indictment here. It says nothing—well, it

says, "Knowing the same to contain a false, fictitious and fraudulent material statement."

Mr. Witt: It is in every one of the four counts.

Mr. Kelley: All that would need to be done to correct it, as I see it, would be under the first part where the Judge states, "It remains for you ladies and gentlemen of the Jury to determine whether, one, the affidavits contained a material false fictitious or fraudulent statement," or whatever the order is, "a false, fictitious, and fraudulent material statement,"—just insert "material".

The Court: That is what I thought when I read it over. The place he is talking about, right after the part we were reading, is that the one? "The affidavits contained a false, fictitious or fraudulent material statement" would be the way it would read, and, two, "That the defendant made and used the affidavits with the knowledge that they contained a statement that was false, fictitious or materially fraudulent," or however the adjective would be.

Mr. Kelley: "Contained a material statement."

The Court: Yes, "Contained a material statement that was false, fictitious, and fraudulent."

[fol. 1148] Mr. Witt: We have in support of our position to be consistent, we have quite a few changes to make in Judge Breitenstein's charge on this. I am ready with all of them aside from our insistence that our requested instruction can, not only the first paragraph but all four paragraphs are proper with respect to this matter.

The Court: Well, we were down—you may go ahead with your specific objections.

Mr. Witt: All right, sir. Now, getting back to Judge Breitenstein's charge, the point where we left it, I had proposed that instead of the partial quotation of Section 1001 the entire section be quoted. I do not think that is too important but to give a little consistency.

The Court: You read it to me.

Mr. Kelley: Well, it leaves out this part about willfully falsifies, conceals or covers up by any trick, scheme or device a material fact. That part is not pertinent to the charge here, and I think it might be confusing to the jury. The only applicable portion of the statute need be given I should think.

The Court: I will look at that instead of arguing about it.

Mr. Witt: May I make clear why we suggest that?

The Court: Yes.

Mr. Witt: It is because of our position on materiality especially in light of the opinion in the Freidus case which I quoted from yesterday. We can call the first clause of 1001 the concealment clause and the clause which is involved in this case, the false statement clause. The word "material" is contained only in the concealment clause.

Mr. Kelley: As to a material fact.

Mr. Witt: But the Freidus opinion reaches the conclusion that nonetheless even though the word "material" does not appear in the false statement clause that "material" modifies the false statement clause as well, and, therefore [fol. 1149] in order for us to be logically consistent in our position throughout the charge we think the concealment clause of 1001 with the word "material" should also be quoted.

The Court: I will look at the statute. I mean putting the whole statute in would rather complicate the thing because there is no contention of concealment or anything like that in this case, and what Judge Breitenstein was doing was picking out the section that he contemplated contained the elements here. If the Government introduced this material element by the indictment, I think it will be proper as I just suggested to put that in as one of the things they have to prove, but I don't know that it would be here, but the record as far as you wish to make it perfectly clear about your position, that is proper, but I will look at the statute and see whether the rest of it can be read or what. We generally try to read only the part that is pertinent to the case usually. What is your next objection?

Mr. Witt: This is a whole series going to the same issue, your Honor. Then after quoting from the statute the charge goes on to say, "For violation of this statute to occur there must be," and then there are four elements given the jury. Now, we say that the fifth element must be added dealing with materiality. Again, we say we didn't press this point on the first trial because it was a lost

cause, but now it is not, and we think especially, if your Honor is going to charge that materiality is an essential element to the offense, it will have to be included as a fifth element at this point.

The Court: It could be put in the third one.

Mr. Witt: It doesn't matter, say "a false, fictitious, and fraudulent material statement", the way you alleged it was.

Mr. Kelley: It is, "a false, fictitious, and fraudulent material statement."

The Court: Put "material" in there.

Mr. Witt: Of course, we think it would be better if it was separated out, but it doesn't matter.

[fol. 1150] The Court: The next one "with knowledge that such statement—"

Mr. Kelley: "—was false, fictitious or fraudulent." I think you don't need knowledge of the material part of it.

Mr. Witt: No, we don't say that as long as we put it in the number three.

The Court: What is the next one?

Mr. Witt: The next one is four paragraphs down, the paragraph in which the charge refers to the stipulation, the one I have mentioned a little while ago. In this paragraph the charge begins by saying, or the paragraph being at this point begins by saying in this case, "In this counsel have stipulated," and then it goes on and concludes by saying, "and that the Board acted upon them." Of course, that is not true on the basis of this record.

The Court: That is why we don't agree.

Mr. Kelley: We certainly don't agree with them.

The Court: There may be—

Mr. Kelley: What he is saying is—

The Court: As I understand what he is saying and what you are saying there may be a choice of words here. You contend that that letter which they stipulated to shows that the Board acted upon the affidavits. He is contending that it didn't show that.

Mr. Kelley: Yes, he claims that this refers to the union using the facilities of the Board, and, if you read this language, it is very clear the Court says they mailed the affidavits in, the affidavits were received, and that the

affidavits were acted upon. Well, the letter itself shows they were acted upon and placed the union in compliance. That is the purpose of the affidavits.

Mr. Witt: The record has to be clear at this point, because Mr. Kelley is very, very badly mistaken. So, I must [fol. 1151] go back to the record on the first trial.

The Court: I am not so much concerned about that. I recall about that. The whole question here, all you're objecting about is that statement that the Board acted upon them. Does this letter you have stipulated to imply that the Board acted on the matter of the affidavits?

Mr. Witt: No. That is why your Honor must permit me, otherwise, we are not being permitted to be heard on this, your Honor, we are not understanding each other. Your Honor, I refer to page 18 of the typewritten transcript of the first trial, the paragraph I referred to yesterday: "It is further stipulated that during the life or the effect of the two affidavits, Exhibits 1 and 4, that the International Union of Mine, Mill & Smelter Workers used the facilities of the National Labor Relations Board," and Mr. Kelley made that statement for the record after we had dealt with the first six exhibits dealing with compliance. So, there is absolutely no question on the basis of the record in the first case that Mr. Kelley's position was that the letters of compliance didn't take care of the materiality problem, that he had to get this further stipulation embodied in the paragraph I just read to the effect that Mine-Mill used the facilities of the National Labor Relations Board.

The Court: It doesn't say anything about the union complying with or using the facilities. It said the Board acted upon them.

Mr. Witt: When you say "this" what are you referring to?

The Court: I am referring to what you are objecting to, the words that I understand you are objecting to in the instructions "and that the Board acted upon them."

Mr. Witt: I am saying that Judge Breitenstein's clause there that the Board acted upon them referred not to the letters of compliance but to this paragraph on page 18

which I just read, the stipulation that the union used the facilities of the National Labor Relations Board.

The Court: That is what I am trying to find out.

[fol. 1152] Mr. Kelley: May I read the letter? The letter is, "Dear Mr. Clark: This will acknowledge receipt of your letter of December 21, 1951, enclosing compliance material submitted in accordance with the filing requirements of Section 9 (f), (g) and (h) of the Labor Management Relations Act ,1947. The National Labor Relations Board will consider your organization in compliance with Section 9 (f) and (g) of the Act until June 30, 1952, and under Section 9 (h) until December 7, 1952, provided there are no intervening changes in your officers. Our Regional and Sub-Regional Offices have been notified of your renewal of compliance." They acted on it.

The Court: I agree with you. I think this is accurately stated in Judge Breitenstein's instructions, and I will give it the way he gave it. I don't think there is any implication that the union availed itself of the facilities or anything else. He simply said and I think the fact is the Board acted upon them by sending that letter and showing the status of the Union.

Mr. Witt: We have made our position clear.

The Court: Yes. What is the next one?

Mr. Witt: Two paragraphs after the one we were just discussing which begins, "To return now to the four elements in the same way as we made—"

The Court: I am going to put in the word "material" there. The only thing I have seen I do not agree with what Judge Breitenstein, I think it has to be submitted to the jury whether he acted knowingly and wilfully in filing them as a matter of fact. I mean it will be a third element added that the affidavits were filed knowingly and wilfully, something like that.

Mr. Kelley: Well, he says, to return now to the four elements which must exist for there to be a violation of the statute—

The Court: It may be the use of his language.

Mr. Kelley: It is clear that this matter is a matter within the jurisdiction. It has to appear.

[fol. 1153] The Court: If they have no objection to it being stated in this form—

Mr. Witt: Yes, they were filed knowingly and wilfully. That is not an issue.

The Court: I won't change it. I will use this form then. What is your next one?

Mr. Deikman: Well, your Honor, I think that Mr. Witt is suggesting a change in the listing again in that paragraph.

The Court: I am putting the word "material" in the paragraph.

Mr. Deikman: Instead of the word "four" the word "five".

Mr. Witt: Well, just something you will do anyway, your Honor, the membership and affiliation instruction, all those paragraphs will be out you have decided?

The Court: Yes, they will all be out. I am going to put in this new one.

Mr. Witt: Then, your next point is on page 293 of the record on appeal, it is the paragraph that beings (sic) with the following sentence, "The defendant may not be convicted on any other charges than those contained in the indictment." That is the paragraph which refers to his executing affidavits in '49 and '50. Your Honor referred to it a while ago.

The Court: Yes.

Mr. Kelley: You have one problem on that, and that is that there was evidence on the policy changed in 1949 and that it never changed again. I mean it remained a policy of compliance.

Mr. Witt: No, sir. Let me make my point which goes to that.

Mr. Kelley: May I say it makes no difference whether you leave 1950 in as far as we are concerned if you feel it should come out.

[fol. 1154] Mr. Witt: So that Mr. Kelley gets the point and your Honor will follow, in that paragraph you will notice that reference is made to the filing of affidavits by all the officers including Travis in '49 and '50. There was evidence as to 1950 in the first case on the first trial but not in this trial as Mr. Kelley apparently just agreed.

In this trial the evidence only goes to 1949, and there is no evidence that affidavits were filed by—

The Court: Then the first thing to do is strike out "and that 1950".

Mr. Witt: That is one change.

Mr. Kelley: It doesn't make any difference to us except we had evidence that the policy changed and that is evidence by the defendant's own statement in the newspaper policy, the union had decided to comply. Then there is nothing on this continuance theory, is what I am thinking about, there is nothing to show that there was any change about that, and you get up to 1954 and you have an election. So, I mean it is immaterial as far as we are concerned.

The Court: Let's see what he would like to have changed.

Mr. Witt: Mr. Kelley is anticipating me. Let me make the suggestion that we think are called for. So, those words "and in 1950"—

The Court: I have stricken that.

Mr. Witt: They go out. Then, the last sentence in that paragraph refers to evidence that the defendant may have admitted other offenses not charged in the indictment. "Offenses" appears there in the plural because Judge Breitenstein was referring to two years but now that we are referring only to 1949—

The Court: That ought to be singular. "That he might have committed an offense not charged in the indictment", and I think it will make it clearer, change the period to a comma and say, "That is, an offense with respect to his 1949 affidavit," is that it?

Mr. Witt: Yes, and then I have a more basic point.

[fol. 1155] The Court: "You are not warranted in finding the defendant guilty in this case simply because you find from the evidence that he may have committed an offense not charged in the indictment and that is with respect to his 1949 affidavit. Is that right?

Mr. Witt: "An offense with respect to", I think that is a little smoother.

The Court: Leave out the "Not charged in the indictment".

Mr. Kelley: "An offense because—"

Mr. Witt: "An offense with respect to his 1949 affidavit."

The Court: See if I have it right: "You are not warranted in finding the defendant guilty in this case simply because you find from the evidence he may have committed an offense not charged in the indictment, that is, an offense with respect to his 1949 affidavit."

Mr. Witt: Yes, sir. Now, up to that point we are more or less agreed. Now, we come to what I think is a more basic problem on this paragraph.

The Court: This is that expert business.

Mr. Witt: No, sir, it is the same paragraph I am talking about. The expert business is the next paragraph. I am talking about the paragraph we have just been revising, and I am referring to the third sentence reading or beginning, "This evidence is pertinent only for the purpose."

The Court: All right.

Mr. Witt: Now, we say that sentence should come out. A moment ago in anticipating this problem Mr. Kelley referred again to the presumption of continuance, because he said there is evidence that there was compliance in '49 and that it continued until 19—at least past—

The Court: I am inclined to think, I see your point, just in an effort to make a little time, you are objecting to this specific reference to '51 and '52, and "This evidence [fol. 1156] is pertinent only for the purpose of enabling you to determine the state of defendant's mind and his intent," you would not have any objection to that phrase?

Mr. Witt: Yes, that is what I was coming to.

The Court: Then I think that is all right, and I will strike out then, "Had he signed and made and used the affidavits knowingly and wilfully with knowledge of their falsity."

Mr. Kelley: I think that is a good statement of the law.

Mr. Witt: Not on these facts, and I haven't been able to make my point. Just let me say this.

The Court: Go ahead.

Mr. Witt: Even if Mr. Kelley was right in his argument on the presumption of continuance with respect to the resignation and the pre-August, 1949, membership, he is clearly wrong in arguing, if that is what he is arguing, that the presumption of continuance applies here, because

your Honor will recall that the affidavits have to be filed each year, so, we are not talking about the continuance of a condition or a status in a sense in which the case discusses the presumption of appearance. This has to be an affirmative act renewed every year.

So, the fact that there is evidence there was compliance in '49 and '51 and '52 and '53 encompassing the March, 1954 election in Montana doesn't permit an inference or a presumption that there was compliance in the year 1950, and, therefore, we say that this third sentence in this paragraph doesn't correctly state the law, because you can't say that the fact that Travis and the other officers filed affidavit in '49, but taking Travis alone throws any light on the state of the defendant's mind and his intent and so forth with respect to '51 and '52 when you have got the 1950 gap.

The Court: I do not know that I agree with that theory.

Mr. Kelley: I think, if you take out "and in 1950", that that is a good statement of the law. It is a prior offense.

The Court: I don't see, I don't believe that that would [fol. 1157] warrant the implication that he puts on it. I think as I presently advised that I will leave it like it is but strike out the 1950 and change this other sentence the way you are talking about.

Mr. Witt: All right, we have made our position clear on it.

The Court: What is the next one?

Mr. Witt: The next paragraph, of course, on expert witnesses is out, but that speaks for itself, your Honor.

Mr. Kelley: What do you mean, Mr. Witt?

Mr. Witt: We have no expert.

Mr. Kelley: No expert?

Mr. Witt: No experts in this case.

Mr. Kelley: It ought to be in the singular.

The Court: It is going to be singular.

Mr. Witt: Who is the singular, Eckert?

Mr. Kelley: That is the only possibility, and he testified as to a fact.

Mr. Witt: Not as an expert. We went through that whole thing.

Mr. Kelley: If defense counsel is willing that that one on expert testimony come out, why, the Government—

The Court: Do you wish that instruction on expert testimony?

Mr. Witt: We think the whole thing is out. There is no expert testimony. We went through that whole thing about Eckert so that his answer about the can't-resign policy, theory was not based on his qualifications as an expert.

The Court: I think I will give it and limit it to singular. That is my present thinking.

[fol. 1158] Mr. Witt: We object to it. Mr. Kelley will agree that the two paragraphs about the cross examination of the character witnesses should go out.

Mr. Kelley: I do not believe we asked him those questions this time.

The Court: What is the next point you have?

Mr. Kelley: You took the one out about the Fifth Amendment.

The Court: Yes. There are two full paragraphs I have taken out.

Mr. Witt: That is it.

The Court: I think I laid aside these instructions, "M" and "I", I think the provisions of "M" are covered by the instructions to be given. We have just gone over it. The instructions cover his intent, proof of it, and all about how it is manifested by the accounts and statements and all of that. I think I will refuse "M" on the ground it is covered in the instructions in so far as it is proper.

Mr. Witt: We object to it, but we have made our position clear when we discussed it earlier.

The Court: Then that leaves "I" still in the mill, and this is entirely independent of this but prompted by the dating I wish you would find out before we leave here, had that date ought to be the 26th of December or the 19th of December?

Mr. Vincent: It is the 26th of December.

The Court: It says December 19, and I am talking about that instruction on membership you gave. You have the date December 26.

Mr. Vincent: That is the date in the indictment.

Mr. Kelley: Both dates are in the indictment.

The Court: The date they have used all through the other instruction is and the ones the defense has been using are these, December 19 and December 3.

[fol. 1159] Mr. Vincent: He executed the first one in '51 on the 19th, and he started the filing process on the 26th. It was received by the Board on the 28th.

The Court: What I am getting at is that Judge Breitenstein used the date all the way through as December 19.

Mr. Witt: Why don't we do that to be consistent. There is no issue about it, just for clarity.

The Court: We will change it to the 19th.

Mr. Kelley: By agreement of the parties we are using the 19th. I suppose you could technically use the period of the 19th to the 26th, I don't know.

The Court: The indictment says he signed the affidavit the 19th.

Mr. Vincent: The date it was executed was the 19th.

The Court: What do you have to say in defense of "I"? I thought it was covered by the instructions. We fixed that part that he wasn't on trial for the 1949 business.

Mr. Kelley: I thought "I" had been covered.

The Court: I passed it. I said I thought it was covered, but I said we would look at the instructions. It relates to the matter we were just talking about.

Mr. Witt: Your Honor has covered it. We would prefer it in this form.

The Court: I will refuse it as being covered already by another instruction.

Mr. Witt: The record may show that we object to it, we prefer it this way.

The Court: I believe that is all.

Mr. Witt: Will your Honor dispose of our requested Instruction No. K?

[fol. 1160] The Court: As I understand, the only matter reserved was with respect to the first paragraph, and as we have gone through the instructions that were given at the first trial I have upon the basis of the contentions of the defense placed in the elements of the offense and then the elements that the Government must prove beyond a reasonable doubt the statement "material statement" or

"fraudulent material statement" or however it read, and consequently, I have also told them that they must be convinced beyond a reasonable doubt that all of the elements concur before there can be a conviction where the subject of this first paragraph is covered.

Mr. Witt: Our position is, your Honor, that in addition to the changes your Honor has indicated which your Honor just referred to that our requested instruction number K should be given, and we object to your Honor's refusal to give it.

In Chambers

The Court: Before proceeding with the arguments I thought it advisable to have a conference with counsel and have asked counsel to come to Chambers. I am going to give the instructions almost verbatim along the line that were given in the other trial except for the changes that were made yesterday, and among other things I think I will give the Statute 1001 in the same form that Judge Breitenstein did but, of course, have added the word "material" as we agreed upon yesterday in the elements of the offense. Also, after reviewing the Government's instruction on membership I am giving it in almost precisely the form that it was tendered, and, likewise, the instruction with reference to affiliation will be given in the form tendered except for the deletions that we talked about yesterday. We eliminated a paragraph here and there.

As I mentioned yesterday, I had thought possibly to avoid a recess at the conclusion of the instructions to enable the defense to make objections and exceptions to the instructions to possibly have the two new instructions, if they might be called that, the one on membership and affiliation, so that I could read them and the objections would be made here this morning. But due to the fact we didn't finish the session yesterday afternoon until rather late and my secre- [fol. 1161] tary hasn't completed the draft, but I am sure from what I said about the instructions that I will give in the case that you are all familiar with the old instructions and with these two new instructions, and I think we may proceed with the arguments, and then after I have finished the instructions, why, we will have a recess and the excep-

tions can be made. The Rules provide that opportunity shall be given the defense to make objections before the case is submitted to the Jury. So, I think we will proceed on that basis.

One other thing that I wish to mention that I think probably would be followed anyway, and that is I prefer not to have counsel say, "The Court will instruct you," and then read from anything, but say that you expect the Court to instruct or something like that.

Mr. Witt: I understand. I think that is the usual procedure.

The Court: I have the forms of verdict. I would like to have counsel check them over to see that they are in proper form.

Mr. Witt: While Mr. Deikman is looking at those forms although I am sure the record is clear, just out of an abundance of caution may the record show that we object or we will object if your Honor does not quote Section 1001 in its entirety. I understood you to say a moment ago that you will just quote the part of it that Judge Breitenstein quoted. Also, out of an abundance of caution may the record show that we object to the Court's instructing on the question of membership and affiliation in the way that the Government has requested. Also, I am not sure that the record has been made clear on this in that same connection: We have objected to the membership instruction requested by the Government on the Constitutional ground, and we also stated that in view of the fact that that instruction embodied all or part of Section 5 of the Communist Control Act of 1954 we think the objections to the membership instruction also are valid as to the affiliation instruction, but we want to make it clear in saying that.

We also intend to say that the Constitutional objections we have to the membership instruction, to-wit, with respect to the First Amendment, the Fifth Amendment, and the [fol. 1162] Sixth Amendment also, therefore, go to the affiliation instruction.

The Court: Very well, those objections will be noted, and it also can be shown that they are overruled, and the Court will proceed on the basis that I have indicated.

* * * * * * *

[fol. 1220]

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the Jury, you have patiently listened to the evidence in this case and the arguments of the lawyers. It now becomes the duty of the Court to instruct you as to the law which will govern your deliberations in the case. This has been a long trial. The strain upon all concerned, the jury, the lawyers, and the Court, has been more than ordinary, and I want to congratulate you upon the patience and attention that you have shown throughout the trial.

During the trial it has become necessary to take several recesses to enable counsel to argue questions which the law requires must be presented to the Court out of the presence of the jury. The delays and interruptions due to these recesses were unavoidable and occur in some degree in every trial. You, therefore, should hold no one responsible for these delays and the interruptions in the actual trial proceedings and give no consideration whatsoever to them in your deliberations.

As I have already told you, it is your duty as jurors to follow the law as stated in the instructions of the Court. It is solely the province of the jury to determine the facts on the evidence presented. In so doing it is the duty of the jury to accept the law as given you in these instructions.

No single one of these instructions states all the law applicable to the case. All of the instructions must be taken and considered together as they are connected with and related to each other as a whole.

At the outset, you should understand some of the well established principles of law applicable to all criminal cases. [fol. 1221] As you know, this is a criminal case.

Under our system of government the defendant enters upon the trial in a criminal case with the presumption of innocence in his favor. That presumption of innocence continues and remains with the defendant in his favor during the trial until it is overcome by evidence and guilt is established to the satisfaction of the jury beyond a reasonable doubt. The presumption of innocence alone is sufficient to acquit the defendant unless the jury is satisfied beyond a

reasonable doubt of the defendant's guilt from all the evidence in the case.

The indictment is no evidence of guilt and must not be considered by you as such. The indictment is merely a formal statement of the offense alleged by the Government to have been committed by the defendant in order that he may know the charges which he must meet. The indictment is not evidence, does not constitute proof, and will be regarded by you only as a statement of the offense.

The defendant in a criminal case is not required to prove his innocence. The burden is on the Government to prove guilt of the offense charged, and every material element thereof, beyond a reasonable doubt. In the event that you have a reasonable doubt as to whether the defendant has been proved to be guilty, then it will be your duty to resolve that doubt in his favor and return a verdict of not guilty as to such counts with respect to which you think that condition attains.

Now, a reasonable doubt is a doubt founded upon a consideration of all the evidence and must be based on reason. Beyond a reasonable doubt does not mean to a moral certainty or beyond a mere possible doubt or an imaginary doubt. It is such a doubt as would deter a reasonably prudent man or woman from acting or deciding in the more important matters involved in his or her own affairs. Doubts which are not based upon a reasonable and careful consideration of all the evidence, but are purely imaginary, or born of sympathy alone, should not be considered and should not influence your verdict. It is only necessary that you should have that certainty with which you transact the more important concerns in life. If you have that certainty, then you are convinced beyond a reasonable doubt. [fol. 1222] A defendant may not be convicted upon mere suspicion or conjecture. A defendant should be acquitted if the evidence is equally consistent with innocence as with guilt.

There are two types of evidence from which a jury may properly find a defendant guilty of an offense; one is direct evidence, such as the testimony of an eye witness; the other is circumstantial evidence, such as the proof of a chain of circumstances pointing to the commission of the offense.

The jury may convict upon circumstantial evidence as well as upon direct evidence if it is so strong and convincing as to prove the guilt of the defendant beyond a reasonable doubt. When the case rests wholly or partly upon circumstantial evidence it must be so strong and convincing as to exclude every reasonable theory and hypothesis of the innocence of the defendant, and when so strong and convincing it meets the requirements of proving the guilt of the defendant beyond a reasonable doubt.

You ladies and gentlemen, as jurors, are the sole judges of the credibility of the witnesses and the weight which is to be given the evidence that has been received in this case.

In judging the credibility of the witnesses as reasonable men and women you may believe the whole or any part of the testimony of any witness or you may disbelieve the whole or any part of it. You should carefully scrutinize the testimony given and in so doing consider all the circumstances under which any witness has testified, his demeanor, and his manner while on the stand. Consider the witness's intelligence, the relation which he bears to the parties interested in the outcome of the action, his interest in the outcome of the case, and the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence if at all. Consider such evidence as there may be relating to the reputation of the witness for truth and veracity. Consider each matter which tends reasonably to shed light on the credibility of a witness.

A witness false in one part of his testimony is to be distrusted in other parts of his testimony. You may reject all or any part of the testimony of a witness who has wilfully testified falsely as to a material point.

[fol. 1223] Some of the Government witnesses have been so-called "informants". You can consider this fact in connection with all other facts relating to such witnesses. It is not unusual for witnesses for the Government in criminal cases to be informants. The fact that a witness has acted as an informant for the Government may be considered by you, along with all other facts and circumstances, in determining the credibility of such a witness.

In weighing the testimony given by former members of the Communist Party or of the International Union of Mine, Mill and Smelter Workers, you should consider whether the circumstances of their membership or of their leaving the Party or the Union might have given rise to some hostility against the Communist Party, or against the International Union of Mine, Mill and Smelter Workers, or against the defendant, or to some self-interest which might affect the accuracy or truthfulness of their testimony.

As I have said, you are the judges of the credibility of each and every witness.

In this case the indictment, as I told you, contains six counts. Two of these counts, Count 3 and Count 6, have been dismissed by the Government.

In the first count of the indictment the Grand Jury charges that, "On or about the 26th day of December, 1951, Maurice E. Travis, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, wilfully and knowingly make and use, and cause to be made and used, within the District of Colorado, a false writing and document, namely, an 'Affidavit of a Non-Communist Union Officer,' executed within the District of Colorado on or about December 19, 1951, which false writing and document the said Maurice E. Travis filed and caused to be filed with the National Labor Relations Board in the City of Washington, District of Columbia, knowing the same to contain a false, fictitious and fraudulent material statement and representation, to-wit, that he, Maurice E. Travis, was not then and there a member of the Communist Party, whereas, as the said Maurice E. Travis well knew, he, Maurice E. Travis, was then and there a member of the Communist Party, in violation of Title 18, United States Code, Section 1001."

[fol. 1224] In Count Two the Grand Jury further charged that, "On or about the 26th day of December, 1951 (that is the same date as in Count One), Maurice E. Travis, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, wilfully and knowingly make and use, and cause to be made and used, within the District of Colorado, a false writing and document, namely, an 'Affidavit of Non-Communist

Union Officer', executed within the District of Colorado, on or about December 19, 1951, which false writing and document the said Maurice E. Travis filed and caused to be filed with the National Labor Relations Board in the City of Washington, District of Columbia, knowing the same to contain a false, fictitious and fraudulent material statement and representation, to-wit, that he, Maurice E. Travis, was not then and there affiliated with the Communist Party, whereas, as the said Maurice E. Travis well knew, he, Maurice E. Travis, was then and there affiliated with the Communist Party, in violation of Title 18, United States Code, Section 1001."

Count Three, as I have told you, has been dismissed.

Count Four is similar to Count 1 except that it relates to a matter occurring in December of 1952. It alleges that the offense occurred on December 3, 1952, and relates to the 1952 affidavit. I don't think it is necessary to read that because it is the same except for the year.

Count Five is the same as Count Two except for the difference in the year. Count Five relates to the December 3, 1952, affidavit, and otherwise it is the same as Count Two which related to the 1951 affidavit. And, as I told you, Count Six has been dismissed.

Now, let me say again that the indictment is merely the statement of the offense charged. It is not evidence against the defendant. The defendant has entered a plea of not guilty to the charges contained in the indictment. The issues which you ladies and gentlemen are to determine are the guilt or the innocence of the defendant on each of the four counts remaining in the indictment.

The Federal statute which the defendant is charged with violating is Section 1001, Title 18, U.S.C. So far as it is pertinent to this case that statute reads: "Whoever in any [fol. 1225] matter within the jurisdiction of any department or agency of the United States knowingly and wilfully * * * makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement" shall be punished as provided by law.

For a violation of this statute to occur, there must be:

1. A matter within the jurisdiction of a department or agency of the United States.

2. The knowing and wilful making and using.

3. Of a false, fictitious or fraudulent material statement.

4. With knowledge that such statement was false, fictitious or fraudulent.

There are those four essential elements.

In this case the Government charges that there are two documents each containing two false statements. These documents are an Affidavit of a Non-Communist Union Officer executed by the defendant in 1951 and a similar document executed by the defendant in 1952.

The Labor Management Relations Act of 1947, and that is sometimes called the Taft-Hartley Act, provides that before a labor union can have certain rights under that law each officer of that union must execute and file with the National Labor Relations Board an affidavit "that he is not a member of the Communist Party or affiliated with such party." The law does not compel the filing of such an affidavit. Thus there is nothing wrong or illegal in not complying with the Taft-Hartley Act in this respect. The law merely provides that the National Labor Relations Board shall not take certain actions relating to labor unions unless certain things are done by the labor union requesting such action. One of those things that the Union has to do to obtain such action is the filing of these so-called non-Communist affidavits by the officers of the Union.

In this case counsel have stipulated—that is just a legal term for "agreed"—that the defendant Travis executed the [fol. 1226] affidavits for each of the years in question. They have stipulated that he mailed the affidavits, or caused them to be mailed to the National Labor Relations Board in Washington, that they were received by that Board, and that the Board acted upon them.

I have ruled as a matter of law that this is a matter within the jurisdiction of a department or agency of the United States.

To return now to the four elements which must exist to constitute a violation of the statute, that is, Section 1001 to which I have referred, it is clear that this is a matter within the jurisdiction of a department or agency of the United States and that the defendant made and used the

affidavits knowingly and wilfully, that is, that the defendant filed or caused to be filed the affidavits with the Board knowingly and wilfully. It remains for you, ladies and gentlemen, to determine whether: 1. The affidavits contained a false, fictitious or fraudulent material statement, and, 2. The defendant made and used the affidavits with the knowledge that they contained a material statement that was false, fictitious or fraudulent.

The United States charges in Counts 1 and 4 that the false statement was that he, Maurice E. Travis, was not then, that is on December 19, 1951, as to Count 1 and on December 3, 1952, as to Count 4, a member of the Communist Party, whereas he was then and there a member of that party.

As to Counts 2 and 5 the charge is that the false statement was that he, Maurice E. Travis, was not on the respective dates, that is, December 19, 1951, as to Count 2, and December 3, 1952, as to Count 5, affiliated with the Communist Party whereas he was then and there affiliated with that Party.

In order for you to return a verdict of guilty as to Count 1 you must find from the evidence beyond a reasonable doubt that the defendant made a false material statement in the December 19, 1951, affidavit when he said that he was not then and there a member of the Communist Party and that he made such statement knowing it to be false. On the other hand, if you find that the United States has failed to satisfy you beyond a reasonable doubt as to either or both of the matters, you should find the defendant not guilty on this count.

[fol. 1227] In order for you to return a verdict of guilty as to Count 2, you must find from the evidence beyond a reasonable doubt that the defendant made a false material statement in the December 19, 1951, affidavit when he said that he was not then and there affiliated with the Communist Party and that he made such statement knowing it to be false. On the other hand, if you find that the United States has failed to satisfy you beyond a reasonable doubt as to either or both of these matters, you should find the defendant not guilty on this count.

In order for you to return a verdict of guilty as to Count 4, you must find from the evidence beyond a reasonable doubt that the defendant made a false material statement in the December 3, 1952, affidavit when he said he was not then and there a member of the Communist Party and that he made such statement knowing it to be false. On the other hand, if you find that the United States has failed to satisfy you beyond a reasonable doubt as to either or both of these matters, you should find the defendant not guilty on this count.

For you to return a verdict of guilty as to Count 5 you must find from the evidence beyond a reasonable doubt that the defendant made a false material statement in the December 3, 1952, affidavit when he said that he was not then and there affiliated with the Communist Party and that he made such statement knowing it to be false. On the other hand, if you find that the United States has failed to satisfy you beyond a reasonable doubt as to either or both of these matters, then you should find the defendant not guilty on this count.

The acts charged in the indictment are alleged to have been done "knowingly" and "wilfully". The word "knowingly" means to act voluntarily and purposely and not because of a mistake or inadvertence or other innocent reason. The word "wilfully" means to act voluntarily and purposely and with the intent to do that which the law forbids.

The crucial issue of fact in this case is whether on December 19, 1951, and December 3, 1952, Maurice E. Travis was or was not then a member of the Communist Party or affiliated with such party.

The affidavits do not call upon any person to state whether [fol. 1228] or not in the past he has ever been a member of the Communist Party or affiliated with it. A person who has been at some time in the past either a member of the Communist Party or affiliated with that Party but who has terminated such membership or affiliation prior to the making of the affidavits would be entitled to sign the affidavits under oath without violating the law.

Since the affidavits speak in the present tense only, the fundamental issue of fact for you to decide is whether or not at the times alleged in the indictment the defendant

knowingly and wilfully used an affidavit which was false and which he knew to be false at that time.

Whether or not the defendant was a member of the Communist Party at the times alleged in the indictment is a question of fact which you are to determine from all of the evidence in the case. In determining this question you must bear in mind that the burden of proof rests on the Government to prove the defendant guilty beyond a reasonable doubt. Membership or lack of membership in the Communist Party may be established by direct as well as circumstantial evidence.

Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the times alleged in the indictment, you may take into consideration the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

[fol. 1229] In determining whether or not the defendant was a member of the Communist Party at the times alleged in the indictment, you may take into consideration whether the defendant: 1. Has made himself subject to the discipline of the Communist Party in any form whatsoever; 2. Has executed orders, plans, or directives of any kind of the Communist Party; 3. Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party; 4. Has conferred with

officers or other members of the Communist Party in behalf of any plan or enterprise of the organization; 5. Has been accepted to his knowledge as an officer or member of the Communist Party or as one to be called upon for services by other officers or members of the organization; 6. Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the Communist Party; 7. Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization; 8. Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization; 9. Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the Communist Party or to anyone else in behalf of the objectives of the organization; 10. Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization; 11. Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization.

These are some of the indicia of Communist Party membership but you are not limited solely to those I have enumerated. As sole arbiters of the facts it is your duty to consider all the evidence either direct or circumstantial which bears upon the question of whether or not the defendant was a member of the Communist Party on the dates alleged in the indictment.

In determining this question, you must bear in mind that the burden of proof rests upon the Government to prove the defendant guilty beyond a reasonable doubt. If you find that the Government has sustained this burden by proving beyond a reasonable doubt, that the defendant was a member of the Communist Party on December 19, 1951, and December 3, 1952, as alleged in the indictment, and [fol. 1230] if you find also that the Government has proved beyond a reasonable doubt the other essential elements of the offense charged in the first and fourth counts of the indictment, as I have outlined them to you, then you must

find the defendant guilty as to the first and fourth counts.

If, however, you find that the Government has not sustained the burden of proving beyond a reasonable doubt that the defendant was a member of the Communist Party on the dates alleged in the indictment, then you must find him not guilty as to the first and fourth counts.

"Affiliation" as used in the in the (sic) second and fifth counts of the indictment is not the same as membership. The word "affiliated", as used in the second and fifth counts of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

A person may be found to be "affiliated" with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite period upon a fairly permanent basis.

"Affiliation" includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving a reasonable cause for the charge of a breach of good faith.

Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you, ladies and gentlemen, are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence.

The defendant may not be convicted on any other charges than those contained in the indictment. There is some evidence in the case that the officers of the International Union of Mine-Mill and Smelter Workers executed non-Communist [fol. 1231] affidavits in 1949 and that the defendant Travis was then an officer of the Union. This evidence is pertinent only for the purpose of enabling you to determine the state of the defendant's mind, his intent, and whether he signed, made and used the 1951 and 1952 affidavits knowingly and wilfully with knowledge of their falsity. You are not war-

ranted in finding the defendant guilty in this case simply because you find from the evidence that he may have committed an offense not charged in the indictment, that is, an offense with respect to his 1949 affidavit.

You have heard the testimony of a witness who has given evidence and testified as an expert, giving an opinion. This class of testimony is proper and competent on matters involving special knowledge or skill, or experience upon certain subjects which are not within the realm of the ordinary experience of mankind and which require special research and study to understand. The law allows those skilled in such special fields to express their opinions and, upon a hypothetical set of facts stated to them, to say whether or not, according to their experience and research, a fact may or may not exist. While an expert is allowed to state his opinions, it is entirely within the province of you, ladies and gentlemen of the Jury, to say what weight shall be given to it. You jurors are bound by the testimony of such a witness just as far as his testimony appeals to your wisdom, convincing you of its truth. The mere fact that witness was called as an expert and gave his opinion upon a particular point does not necessarily obligate you to accept his opinion as to what the facts are in the face of testimony of witnesses claiming to have actual knowledge of the facts.

The defendant has offered evidence in this case as to his good character for truth and veracity. In this connection, the law is that the defendant is entitled to put in issue his good character. The good character of the defendant is evidence and a circumstance which you should take into consideration, together with all the other facts and circumstances in determining the guilt or innocence of the defendant on the offense charged.

While testimony of good character is not a defense to a crime, such character testimony may alone create a reasonable doubt although without it the other evidence would be convincing. That is for you to determine. If you find from the evidence in this case, beyond a reasonable doubt, that [fol. 1232] the defendant did commit the offense as charged in the indictment, it will be your duty to convict him, notwithstanding his good character.

The only person who is on trial in this case is the defendant, Maurice E. Travis. The International Union of Mine, Mill and Smelter Workers is not on trial. Many references during the trial have been made to this Union. This testimony is only pertinent and admitted for your consideration as it has borne on the issues here regarding the truth or falsity of the charge in this case against the defendant Travis. The only issues for you to determine are the guilt or innocence of the defendant Travis on each of the four counts in the indictment.

You may not presume the existence of a fact and then infer from such presumed fact the existence of any other fact or circumstance. You may not infer from any presumed fact or facts that the defendant is guilty of any of the offenses charged in the indictment.

In every crime there has to be a joint operation to act and intent. The burden is on the Government to prove both act and intent beyond a reasonable doubt.

With respect to offenses such as charged in this case, proof of specific intent is required before there can be a conviction. Specific intent, as the term suggests, means more than a mere general intent to commit an act.

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does, there can be no eyewitness account of the state of mind with which the act was done. What a defendant does may indicate intent or lack of intent to commit the offense charged.

In determining the issue as to intent the Jury is entitled to consider any statements made and acts done by the defendant, and all facts and circumstances in evidence which may aid in the determination of state of mind.

A person is held to intend all the natural and probable consequences of acts knowingly done. The law assumes a [fol. 1233] person to intend all the consequences which one standing in like circumstances and possessing like knowledge should reasonably expect to result from any act which is knowingly done.

As you have observed the defendant did not take the witness stand. That fact must not prejudice you against him.

The statutes of the United States provide in Section 3481 of Title 18, United States Code, that: "In the trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts-martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request be a competent witness. His failure to make such request shall not create any presumption against him." You must, therefore, determine the guilt or innocence of the defendant on the basis of the evidence received in the case and not by what has not been given in evidence. As the statute says, the failure of a defendant in a criminal case to testify creates no presumption against him. You must not permit the fact that the defendant has not testified to weigh in any degree against him. That fact should not enter into the discussions or deliberations of the Jury in any manner.

Statements and arguments of counsel, as I have said several times in this case, are not evidence unless made as an admission or a stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, as they have in this case, the Jury must accept the stipulation as evidence and regard that fact as conclusively proved.

If the Court has done or said anything that has caused you to believe that you know how the Court feels this case should be decided, you should entirely disregard such opinion in arriving at your verdict. The law is that you should not be guided in your consideration of the case by what you may think the Court feels about the guilt or innocence of the defendant.

Your judgment must be your own, uninfluenced by the Court except that you are bound to follow the law of the case as the Court gives it to you in these instructions. As I have told you, the Court is the judge of the law. It is your duty to accept the Court's decision as to the law. On the other hand, you are the sole judges of the facts. You shall [fol. 1234] act independently, using your own common sense and judgment, and performing your duty under your oaths in deciding the facts wholly independent of any influence of the Court.

In determining the facts you should consider only the evidence given upon the trial. Evidence offered at the trial

and rejected by the Court and evidence stricken from the record by order of the Court must not be considered by you.

I again repeat that you will consider these instructions in their entirety and as a whole. You should not separate any portion of them from the whole and depend upon that or any other portion.

In order for you to reach a verdict all 12 of you must agree upon the verdict. When you retire you will first select a foreman. The verdicts which you agree upon will be signed by the foreman and then you will return them here in court. You may take the indictment with you into the jury room, but I again remind you that Counts 3 and 6 have been dismissed and I again instruct you that the indictment is not evidence against the defendant and should not be so considered. It is merely the formal charge.

If you care to examine any of the exhibits which have been received in evidence, let your wishes be known to the bailiff who will have you in charge, and he will obtain the exhibit or exhibits from the Clerk.

In this regard there is one other matter I wish to mention. Counsel during the trial have referred to the transcript of the evidence which has been prepared from day to day by the reporter. The law is that I cannot permit you to have that transcript in the jury room. In cases where there is a daily transcript it is quite common to have a request from the Jury for a copy of the transcript, but under the law which binds me I cannot let you have that. Also, under the practice in this jurisdiction, the instructions are oral and you cannot have a copy of the instructions.

Forms of verdict have been prepared for your convenience. As to each of the four counts there are two forms. One form will be signed by your foreman as to each count if you find the defendant guilty; the other form as to each [fol. 1235] count if you find the defendant not guilty. The forms are very simple and I believe you will have no difficulty in understanding them. Please remember that you must return a verdict on each of the four counts.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff, but bear in mind this, please, that you are not to reveal to the Court or to any person how the jury stands numerically

or otherwise on the guilt or innocence of the defendant on any of the four counts until after you have reached a unanimous verdict and returned it into Court.

Those, ladies and gentlemen, are the instructions as to the law the Court proposes to give you. I wish at this time that counsel would come to the Bench.

(Conference at the bench.)

In Chambers

The Court: At this time counsel can make, either side may make any additional objections which have not already been noted to any of the Court's instructions.

MOTION FOR MISTRIAL AND DENIAL THEREOF

Mr. Witt: If the Court please, I was more anxious to come in and say a word about a motion for mistrial made during the course of Mr. Kelley's summation than to make further objections so the record will be clear. You recall I made a motion for mistrial when Mr. Kelley was referring to Eckert's testimony about Willard Morris, and Mr. Kelley said at that point that Willard Morris was the right-wing counsel for the union then. This was you recall, your Honor, in connection with the Steering Committee meeting related to the February, 1946, Board meeting.

In saying that Mr. Kelley wasn't being accurate as far as the testimony goes. I have since checked it to make sure. The transcript which I do not have here will show that Eckert was asked whether Willard Morris was a member of the Communist Party, and his answer was no. So, there is no reference in the testimony that Willard Morris was the right-wing counsel, just the testimony that he wasn't a member of the Communist Party. This is not being hyper- [fol. 1236] technical, if the Court please, or hypersensitive, but in view of the matters contained in our motions for mistrial in connection with the testimony of the witness Eckert based on the changes in his testimony, in light of discussions with the prosecution which we considered improper we think Mr. Kelley should have been supremely careful in staying away from this problem on summation, and added to those other matters in connection with the

testimony of the witness Eckert we think this reference of Mr. Kelley, a wrong reference to the testimony of Eckert justifies a mistrial.

Just one final word, your Honor,—I hate to keep you longer because of the situation with the jury—it seems to me, maybe I am hypersensitive, but the names and incidents or meetings and all the rest of it that Eckert testified to on direct Mr. Kelley has selected only a few illustrations in his summation to the jury and Eckert's testimony about Willard Morris is one of the most minor in the whole length and scope of the testimony, so, it is particularly unfortunate that Mr. Kelley injected the reference to a person who was in '46 according to the way Mr. Kelley put it right-wing counsel.

The Court: Well, I see no basis from what you have just stated that would warrant a reconsideration of my action in the courtroom in denying the motion for a mistrial, but I will deny this motion also for a mistrial. Now, if you have any additional objections to the instructions, why, I wish you would state them for the record. The ones you have already stated, of course, are already in the record, and your record is preserved on them, and I think you should try to limit it to any additional objections.

Mr. Witt: We understand. Will you give us a moment?

The Court: All right.

OBJECTIONS TO INSTRUCTIONS

Mr. Witt: This, again, is out of an abundance of caution. I am quite sure the record yesterday shows that your Honor stated that he would quote only the same part of Section 1001 that Judge Breitenstein stated.

The Court: It was this morning. It is in the record this morning.

Mr. Witt: I think the record shows our objection. If not, [fol. 1237] we make it now. I am not sure, again, it is because I am tired, your Honor, so you will forgive me if I am repeating myself, I am not sure that yesterday in objecting to the proposed instruction on affiliation as requested by the Government and as indicated by your Honor you would give we made specific objections among other things to the last paragraph of each of those instructions. If we didn't yesterday, may we do so now? That is the paragraph

referring to the fact that the juror may take into consideration all other evidence, et cetera, et cetera. Our point on that, whatever validity the instructions have otherwise is destroyed by the scope and breadth and looseness of those final paragraphs in the two respective instructions.

The Court: I omitted and there wasn't given in the instructions the last paragraph on the Government's tendered instruction.

Mr. Kelley: He means on the membership one.

Mr. Witt: And the affiliation.

Mr. Kelley: And affiliation. After you list the indicia then you state in effect that the jury is not limited to those but can consider all others.

The Court: That is also with respect to the membership.

Mr. Witt: The record will show. If I am wrong, the record will show.

The Court: I want the record to be sure, because there is no record of the tendered instruction until I dictated it in. I omitted the last paragraph of the tendered instruction in which I thought I discussed yesterday in detail it might have constituted an invitation to the jury to consider these membership indicia as being applicable to the affiliation.

Mr. Witt: If there is any doubt in your mind, it won't take too long for Miss Marson to find it.

The Court: Your objection is clear. I mentioned that so the record will be clear. Are there any other objections? [fol. 1238] Mr. Witt: Again, these two things are out of an excessive abundance of caution, but I am sorry, that is the way I feel, I think we objected to the paragraph when we discussed it yesterday relating to testimony by experts. We want the record to show that we object to that again. Then I think we objected yesterday to your Honor's reference or proposed reference to some informers in the paragraph relating to the weighing of the informer testimony and the fact that this record shows there was only one informer which just confuses and bewilders the jury it seems to us, and, if Mr. Kelley was right in his summation and it had any effect on the jury that informers are patriots or something along those lines—he didn't use that word—the effect of your Honor's instruction referring to some informers when there was only one is merely to heighten the

effect of Mr. Kelley's reference to that in his summation if it took any effect.

The Court: I think that objection was made yesterday and overruled, and it will be overruled now. Are there any further objections?

Mr. Kelley: The Government has no objections.

The Court: Let's go in now and discharge this 13th juror I guess is the next step in the thing.

In Chambers

The Court: You may proceed.

Mr. Deikman: On page 1870 of the transcript reads, line 6, "The affidavit as to membership and Count 3 relates to—" at that point I am quite sure I said Count 2 rather than Count 3.

The Court: I see no objection. Count 3 is the one that has been dismissed.

Mr. Deikman: I was referring to the count that relates to falsity of the affidavit as to—

The Court: You want to change "3" to "2". I am going to change this original with a pen. One thing I just thought of, I think you had better take all exhibits up to the jury if [fol. 1239] there is no objection rather than for them to send down.

Mr. Kelley: It has happened already.

The Court: They have all of them?

Mr. Kelley: All that were admitted.

The Court: That is the way it had better be, because otherwise the Clerk would have them, and the Clerk may be gone or something, and we might as well send the whole works up. The Marshal was inquiring, and I didn't know whether he wanted them all or part of them.

Mr. Kelley: They were all turned over to them. Mr. Deikman and Government counsel checked them and with the Clerk, and I am sure we got the right ones.

In Open Court

The Court: Ladies and gentlemen of the Jury, have you reached your verdicts in this case?

The Foreman: We have, your Honor.

The Court: You may hand the verdicts to the Bailiff and he will transmit them to me. Ladies and gentlemen of the Jury, you will listen to the reading of your verdicts: "In the United States District Court for the District of Colorado, the United States of America, Plaintiff, vs. Maurice E. Travis, Defendant, Criminal No. 14266. Verdict. We, the Jury, in the above-entitled case upon our oath do say we find the defendant, Maurice E. Travis guilty as charged in Count 1 of the indictment herein." Signed Otto Gardner, Foreman.

The second verdict is as follows: "In the United States District Court for the District of Colorado, the United States of America, Plaintiff, vs. Maurice E. Travis, Defendant, Criminal 14266. Verdict. We, the jury, in the above-entitled case upon our oath do say we find the defendant, Maurice E. Travis guilty as charged in Count 2 of the indictment herein," and it is signed by Mr. Gardner, Foreman.

The third verdict: "In the United States District Court [fol. 1240] for the District of Colorado, the United States of America, Plaintiff, vs. Maurice E. Travis, Defendant, Criminal 14266. Verdict. We, the Jury, in the above-entitled case upon our oath do say we find the defendant, Maurice E. Travis, guilty as charged in Count 4 of the indictment herein." Signed, Otto Gardner, Foreman.

The last verdict: "In the United States District Court for the District of Colorado, the United States of America, Plaintiff, vs. Maurice E. Travis, Defendant, Criminal 14266. Verdict. We, the Jury, in the above-entitled case upon our oath do say we find the defendant, Maurice E. Travis, guilty as charged in Count 5 of the indictment herein." Signed Otto Gardner, Foreman.

Ladies and gentlemen of the Jury, are these and were these your verdicts in this case? (assent) Do you desire that the jury be individually polled?

Mr. Witt: We do.

The Court: As to all counts?

Mr. Witt: Yes, sir, as to all counts.

(Jury polled as to Count 1:)

Mr. Witt: Were all the jurors polled?

The Clerk: Yes, sir.

Mr. Witt: We waive the poll of the jurors as to the other three counts.

The Court: All right, then, the verdicts will be received and recorded, and the matter will be referred for a presentence report. I gather—is there any objection on the part of the United States for the defendant to remain at liberty on the present bail until the case is disposed of?

Mr. Kelley: No, your Honor, and at this time we would like to move for judgment on the verdicts.

The Court: The verdicts will be recorded, and, of course, [fol. 1241] the judgment will not be until sentencing, but there is no objection to his remaining at liberty on his present bail bond?

Mr. Kelley: Right.

The Court: And the matter will be referred for a presentence report.

Mr. Witt: Pursuant to the discussion in chambers we will file our appropriate motions under the rules.

The Court: Very well. You will have that right to do that.

Mr. Deikman: May I have a conference with Mr. Witt before the jury is discharged?

The Court: Yes.

OBJECTIONS TO VERDICTS AND COURT'S RULING

Mr. Deikman: Your Honor, at this time the defendant objects to the verdicts on the grounds that they are null and void and have no legal effect whatsoever and no valid judgment can be based upon them in so far as the verdicts do not inform the defendant as to whether he is in the minds of the jury guilty of membership, falsity of the affidavit in regard to membership or falsity of the affidavit as to affiliation as to each of the two years in question in the indictment, and for that reason because the verdict of the jury is inconsistent and the findings as to affiliation and membership repugnant to one another the defendant is not informed of what he has been found guilty, and, therefore, the verdicts are invalid.

The Court: The motion will be denied.

Filed March 17, 1958.

[fol. 1242] PLAINTIFF'S EXHIBIT 1.

Form NLRB-1081
(6-49)

United States Of America
National Labor Relations Board
Affidavit Of Noncommunist Union Officer

(See instructions on reverse)

The undersigned, being duly sworn, deposes and says:

1. I am a responsible officer of the union named below.

2. I am not a member of the Communist Party or affiliated with such party.

International Union of Mine, Mill & Smelter Workers
(Full name of union, including local name and number)

.....

(Full name of national or international union of which it is an affiliate or constituent unit)

Signature M. E. Travis
Address 412 Tabor Building
Denver, Colorado

(The notary public or other person authorized by law to administer oaths must fill in completely all blank spaces below.)

Subscribed and sworn to before me this 19th day of December 1951 A notary public or other person authorized by law to administer oaths and take acknowledgements in and for the county of Denver, State of Colorado My commission expires March 23, 1955

(Seal)

Fuchsia L. Mitchell
(Signature)

[Reverse]

Instructions For The Use Of This Form

Who Must File.—This affidavit must be filed by each officer of a labor organization before that organization may receive the help of the National Labor Relations Board. [fol. 1243] An affidavit must be on file for each officer listed in your constitution and by-laws.

Where To File.—National And International Labor Organizations must file this affidavit with the Affidavit Compliance Branch, National Labor Relations Board, Washington 25, D.C.

Local Labor Organizations must file this affidavit with the Regional Office of the National Labor Relations Board with which they usually file cases.

When To File.—This affidavit is good for only one year from the time it is signed and must be renewed each year. Each time a new officer is elected or appointed, he must file this affidavit. If an officer is reelected, it is not necessary to file a new affidavit unless the affidavit on file with the National Labor Relations Board is more than one year old.

How To Prepare This Affidavit:

a. Read carefully items 1, 2 and 3 of this affidavit.

b. Fill in the full name of your labor organization, including the local name and number.

If your organization is affiliated with a national or international organization, give the full name of the national or international.

(Example)

Plastic, Button and Novelty Workers Union, Local 506

International Ladies Garment Workers Union—AFL

c. The officer must sign his name in the presence of a notary or other person authorized by law to administer oaths.

d. The officer must give his full home address; be sure to give the street address, city and State.

[fol. 1244] PLAINTIFF'S EXHIBIT 2.

International Union Of Mine, Mill And Smelter Workers

Founded In 1893

Suite 412—Tabor Building 16th and Curtis Denver 2, Colorado Keystone 7211

December 21, 1951

Mr. Claude B. Calkin, Affidavit Compliance Officer, National Labor Relations Board, Washington 25, D.C.

Dear Sir: In connection with the filing requirements of the Labor-Management Relations Act, 1947, we enclose NLRB Form 1080, Certificate of Union Officers, and Forms NLRB 1081, the notarized affidavits of our officers and executive board members.

Very truly yours,

John Clark
President

jc/v
enc
Air Mail
Registered
Return Receipt

PLAINTIFF'S EXHIBIT 3.

January 8, 1952

Mr. John Clark, President, International Union of Mine, Mill and Smelter Workers, Suite 412, Tabor Building, 16th and Curtis, Denver 2, Colorado.

Dear Mr. Clark: This will acknowledge receipt of your letter of December 21, 1951, enclosing compliance material submitted in accordance with the filing requirements of Section 9 (f), (g) and (h) of the Labor Management Relations Act, 1947.

The National Labor Relations Board will consider your organization in compliance with Section 9 (f) and (g) of

the Act until June 30, 1952, and under Section 9 (h) until December 7, 1952, provided there are no intervening changes in your officers.

[fol. 1245] Our Regional and Sub-Regional offices have been notified of your renewal of compliance.

This, of course, does not cover your local organizations. Each local must separately meet the above filing requirements of the Act in order to enjoy its benefits.

We will give you thirty days advance notice, whenever possible, of pending expiration of compliance as reflected by our records. We assume no responsibility for notification as it is your obligation to keep this material up to date.

Very truly yours,

Claude B. Calkin,
Affidavit Compliance Officer

PLAINTIFF'S EXHIBIT 4.

Form NLRB-1081
(6-51) United States Of America
National Labor Relations Board
Affidavit Of Noncommunist Union Officer

(See instructions on reverse)

The undersigned, being duly sworn, deposes and says:

1. I am a responsible officer of the union named below.

2. I am not a member of the Communist Party or affiliated with such party.

.....

(Full name of union, including local name and number)

International Union Of Mine, Mill And Smelter Workers
(Full name of national or international union of which it is an affiliate or constituent unit)

Signature M. E. Travis

Residence 3456 Decatur Street
Denver, Colorado

(The notary public or other person authorized by law to administer oaths must fill in completely all blank spaces below.)

[fol. 1246] Subscribed and sworn to before me this 3rd day of December 1952 A notary public or other person authorized by law to administer oaths and take acknowledgements in and for the county of Denver, State of Colorado My commission expires November 9, 1955

(Seal)

Myrtle L. Tully
(Signature)
Notary Public

[Instructions on reverse side identical with those appearing on reverse side of plaintiff's exhibit 1.]

PLAINTIFF'S EXHIBIT 5.

International Union Of Mine, Mill And Smelter Workers

Founded In 1893

Suite 412—Tabor Building 16th and Curtis Denver 2, Colorado Keystone 7211

December 3, 1952

National Labor Relations Board, Washington 25, D.C.

Gentlemen: In accordance with the provisions of the Labor-Management Relations Act, 1947, we enclose herewith Form NLRB 1080, Certificate of Union Officers and Affidavits of Non-Communist Union Officer signed by the officers of our organization.

Very truly yours,

John Clark
President

jc/v
encs

PLAINTIFF'S EXHIBIT 6.

December 8, 1952

Mr. John Clark, President, International Union of Mine, Mill and Smelter Workers, Suite 412, Tabor Building, 16th and Curtis Denver 2, Colorado

Dear Mr. Clark: This will acknowledge receipt of your [fol. 1247] letter of December 3, 1952, enclosing material submitted in accordance with the filing requirements of Section 9 (f), (g), and (h) of the Labor Management Relations Act, 1947.

The National Labor Relations Board will consider your organization in compliance with Section 9 (f) and (g) of the Act until June 30, 1953, and under Section 9 (h) until November 18, 1953, provided there are no intervening changes in your officers.

Our Regional and Sub-Regional offices have been notified of your compliance.

This, of course, does not cover your local organizations. Each local must separately meet the above filing requirements of the Act in order to enjoy its benefits.

We will give you thirty days advance notice, whenever possible, of pending expiration of compliance as reflected by our records. We assume no responsibility for notification as it is your obligation to keep this material up to date.

Very truly yours,

Robert Frazer
Affidavit Compliance Officer

Govt exhibit 8
DEC 6 1955
Crim 14266

TRAVIS STATEMENT ON SIGNING TAFT-HARTLEY LAW AFFIDAVIT

By Maurice Travis
Int'l Secretary-Treasurer

The Executive Board of our International Union has voted to comply with the Taft-Hartley Law. I support this decision.

As most of the membership knows, I have stated, more than once in the last two years, that if it became important to the life of our union to comply with Taft-Hartley, I would support such a step. The reasons which have now made it vital to our Union to comply, are the betrayal of labor's fight for repeal of the Taft-Hartley Act by the controlling leadership of both the CIO and the AFL, by the 81st Congress and the Truman Administration — a betrayal which now saddles the labor movement with this law for another two years—and as part of that betrayal, the adoption of raiding, gangsterism and strikebreaking as official policy by reactionaries in the leadership of CIO.

Since the Executive Board meeting at which compliance was voted, I have deliberated very carefully on my course and I have also had the benefit of thorough discussions with my fellow officers, Executive Board members and members of the Staff. The unanimous opinion of my fellow officers and the others in the International Union is that the most effective way in which I can serve the International Union is by continuing in my post as an officer of the International Union.

☆ ☆ ☆

SINCE THE INTEREST of the International Union is uppermost in my mind, I have been confronted with the problem of resigning from the Communist Party, of which I have been a member, in order to make it possible for me to sign the Taft-Hartley affidavit. I have decided with the utmost reluctance and with a great sense of indignation, to take such a step. My resignation has now taken place and, as a result, I have signed the affidavit.

This has not been an easy step for me to take. Membership in the Communist Party has always meant to me, as a member and officer of the International Union, that I could be a better trade unionist; it has meant to me a call to greater effort in behalf of the union as a solemn pledge to my fellow members that I would fight for their interests above all other interests.

The very premise of the Taft Hartley affidavits is a big lie the same sort of lie that made the peoples of Germany, Italy and Japan down the road to fascism. It is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union. On the contrary, trade unions are an integral part of a Socialist society, the kind of society in which Communists believe. Therefore, I believe that good Communists are good trade unionists.

☆ ☆ ☆

THE BIGGEST LIE of all is to say that the Communist Party teaches or advocates the overthrow of the government by force and violence. If I had believed this to be so I would not have joined the Communist Party. If I had later found it to be so I would never have remained in it. All the slanders by the corrupt press, all the FBI stool pigeons, and all the persecution of Communist workers will not make me believe it is so. I believe that when the majority of the American people see clearly how rotten the foundation of the capitalist system is, they will insist on their right to change it through democratic processes, and all of the reactionary force and violence in the world will be unable to stop them.

It is because I believe these things that I have fought the affidavit requirement of Taft-Hartley. I believe it is a blot on American life; I believe under our Bill of Rights, for which our forefathers fought, that an American has as much right to be a Communist as he has to be a Republican, a Democrat, a Jew, a Catholic, or an Elk or a Mason. Free voluntary association is the very cornerstone of the democratic way of life. I have been a Communist because I want what all decent Americans want, a higher standard of living for all the people, the ending of discrimination against Negroes, Mexican-Americans, and all other minority groups. I want a peaceful America in a peaceful world. Despite my resignation from the Communist Party, I will continue to fight for these goals with all the energy and sincerity at my command.

I am also taking this step because I believe it is one effective means of bringing home not only to the membership of the International Union but to the people generally, the dastardly and unprecedented requirement that a man yield up his political affiliations in order to make a government service available to the people he represents. This is a dangerously backward step in American political life which threatens all of our democratic institutions. Americans have the right to belong to the political party of their choice and trade union members have the right to choose their own leaders. Denial of these principles undermines democracy and gives comfort to the arrogant reactionaries who seek to put our country on the road to fascism.

☆ ☆ ☆

AT THE SAME TIME, I want to make it absolutely clear that my opinion continues to be that only a fundamental change in the structure of our society, along the lines implied in the very words of the charter of our International, "Labor produces all wealth—wealth belongs to the producer thereof," can lead to the end of insecurity, discrimination, depressions and the danger of war.

I am convinced that capitalistic greed is responsible for war and its attendant mass destruction and horror. I am convinced it is responsible for depression, unemployment and the mass misery they generate. The present deepening depression, growing unemployment, and threat of war confirm my conviction that the only answer is Socialism.

As a matter of fact, this Socialist concept has always been the guiding principle for American workers. The struggle led by the great Eugene V. Debs, the early fight for the 8-hour work day, the steel and packing struggles led by Bill Foster, the stormy history of the I.W.W. were all influenced by Socialist ideals.

As a member of our International Union I have always been proud of and have drawn strength from its basic Socialist tradition. No other union in this country matches ours in its glorious working-class history. Our union, and its predecessor, the Western Federation of Miners, has carried on some of the most bitter and courageous struggles in the history of the labor movement. I have always been inspired by the fact that early leaders of this union were socialistic in one form or another, that Bill Haywood also took the road to Communism and died not only as a great leader of the working class but as an honored and respected Communist.

Therefore, I want to make it crystal clear that my belief in Communism is consistent with what I believe to be the best interests of the members of this Union and the American people generally and that I am especially happy to be able constantly to remember that it is consistent with the finest traditions of the International Union.

☆ ☆ ☆

I KNOW THAT SOONER or later we will turn this present shameful page in American life, that the reactionary offensive will be beaten back and that the American workers will again resume their march on the road to peace, progress and prosperity. Particularly do I know that the day will come when loyalty oaths and affidavits will be a thing of the past, when the true test will again be service to the people and, for trade union leaders, service to their members.

In the meantime, I am sure that every member of the International Union joins me in my pledge to fight to keep this International Union strong, to bend every effort to make it even stronger, to continue to keep it on a progressive, militant course, and to do everything in my power to make life in our country happy, secure, prosperous and peaceful.

It's Official Now

President John Clark announced last week that he had been officially notified in a letter from the National Labor Relations Board that Mine-Mill is in full compliance with the provisions of the Taft-Hartley Act and is now eligible to use the processes of the board.

The formal compliance notification followed the unanimous decision of Mine-Mill's International Executive Board to meet the signing requirements of the Taft-Hartley Act.

MAURICE TRAVIS

(Picture taken before Travis lost an eye in beating by Shipbuilder thugs at Bessemer, Ala.)

[fol. 1251] DEFENDANT'S EXHIBIT A

FBI Detroit 4/8/53

Director, FBI And SAC Alburquerque

Clinton Edward Jencks, Kenneth Eckert Advised That Jencks Attended Several CP Meetings Between August Twenty Fifth And Thirty, Forty Seven At Lowry Hotel, St. Paul, Minn. These CP Meetings Were In Connection With Convention Of IUMM&SW Held At That Time. Eckert Advised Several CP Meetings Were Called By The Top Steering Committee Of IUMM&SW Composed Of Maurice Travis, Chase Powers, L. Skinner And Eckert, All CP Members. Eckert Does Not Recall Exact Number Of Meetings Attended By Jencks But These Meetings Were Called To Plan CP Activity At Convention. Eckert Fairly Certain That Jencks Attended CP Meetings After This At Various Cities Throughout The U.S. But Stated He Would Be Unable To Testify As To Places Or Dates Of Subsequent Meetings. Eckert Explained That Jencks Was In A Lower Echelon Than Eckert And Thus They Were Not In Contact Often. Subpoena Should Be Addressed To Eckerts Home, Two Two Five Three Two Alexander Lane, St. Clair Shores, Mich.

DEFENDANT'S EXHIBIT B

SAC, Seattle January 5, 1956
SAC, Detroit
Charles Joseph Powers.

Kenneth Eckert, Representative of the Die Casting Workers, UAW-AFL-CIO, 408 Notre Dame, Grosse Pointe, Michigan, was interviewed by SA Emil J. Rothfuss and SA J. F. Sullivan on December 28, 1955. Eckert, a self-admitted member of the Communist Party (CP), 1932-1948, has testified in behalf of the United States Government in various trials and hearings.

Eckert, a former union official of the Mine, Mill and Smelter Workers, advised that he, (Eckert), and Chase Powers were among the members of the CP Steering Committee in the Mine, Mill and Smelter Workers, 1946-1948, at which time he, Eckert, broke with the CP.

According to Eckert, the CP Steering Committee meet-
[fol. 1252] ings were held before the meetings of the International Executive Board of the Mine, Mill and Smelter Workers, at which time Mine-Mill Policy, Party decisions and major decisions were discussed. During that period Chase Powers was a member of the Executive Board of the Mine, Mill and Smelter Workers.

EJR:dmc

Eckert stated that he knew Chase Powers as a CP member from approximately 1945, to 1948; however, he had never seen Powers' CP card since both belonged to different branches of the CP.

Eckert advised that he would not furnish a signed statement and would not testify to the information set forth above. He stated that the time factor involved in testifying would not enable him to carry on his current union responsibilities. In addition, Eckert indicated that in testifying in matters of this type, it placed him in a very damaging position within his union.

DEFENDANT'S EXHIBIT L

(Page 5.)

In regard to the Wallace-Kellogg, Idaho, area, Gardner stopped in Denver, Colorado to confer with Harold Sanderson, and IUMM&SW Official, and Maurice Travis, then International Secretary and Treasurer of IUMM&SW. Sanderson then informed Gardner of a delicate factional dispute both within the CP and IUMM&SW in the Idaho area. Sanderson told Gardner that Rudy Hanson, a former IUMM&SW Organizer and a CP member, would be expelled from the CP for activities detrimental to the Party and to IUMM&SW. Sanderson told Gardner how Hanson was undermining Chase Powers in the hope that Hanson would replace Powers as a Board Member of IUMM&SW. Sanderson told Gardner not to attempt to make any Party contacts and that if the Party thought it necessary they would contact Gardner.

[fol. 1253] DEFENDANT'S EXHIBIT R

SAC Wyly
SA Zoeller

August 10, 1953

William Mason orally advised on August 7, 1953, that his fight with the Travis machine in Mine-Mill was apparently breaking into the open. He stated that Travis had settled the Union's dispute with A.S. and R. for 8½ cents per hour and had also, without checking with the other sections of the Union, extended the contract to 1956.

Informant said that Travis, feeling quite pleased with himself over this, had erroneously interpreted a proposal made to the Anaconda Copper Mining Company as amounting to only 6 cents an hour and had severely criticized the Executive Board members for District No. 1 and the Montana locals. Informant said that in fact the proposal to the A.C.M. Company was much greater than 8½ cents per hour.

As a result, the Montana members were very upset with the international officers and were demanding to know what was going on. Travis realizing his error flew in from Denver and had a conference with William Mason and John Clark. Travis urged that there be no inter-union split and that the Union should present a united front to the various companies.

William Mason really told Travis off including charges of Communism on the part of Travis.

Travis, calling a meeting of the Union's Wage Policy Committee in Denver for August 10, 1953, urged William Mason to come early to the meeting to meet with him, noting that they could settle their differences. To counter this move on the part of Travis, Mason has called a meeting of the Anaconda Wage Council for Denver on the same date. Informant said that the open fight is becoming greater every day and this is the beginning of a definite anti-Travis move, at least on the part of the Montana locals.

Informant stated that he would contact the writer upon his return from Denver.

[fol. 1254] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1255]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Pleas and proceedings before The Honorable William Lee Knous, Chief Judge of the United States District Court for the District of Colorado, and The Honorable Jean S. Breitenstein, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

UNITED STATES OF AMERICA, Plaintiff,

vs.

MAURICE E. TRAVIS, Defendant.

No. 14,266, Criminal.

SUPPLEMENTAL TRANSCRIPT OF RECORD

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION No. A.

You are instructed that the defendant's admitted membership in the Communist Party before August, 1949 did not constitute a bar to his truthful signing of the affidavits in 1951 and 1952 if in fact he terminated his membership at or before the time that he had signed the affidavits. Past members of the Communist Party may truthfully sign the affidavit if they first terminate their membership. And it does not matter whether the termination takes place years before or a day before the affidavit is signed so long as there is in fact a termination. I direct your attention to the fact that the affidavit is in the present tense and the defendant was not called upon to make, and did not make any representation in his two affidavits concerning his past membership. Such past membership is in no sense inconsistent with the truth of his affidavits. On the contrary, the law contemplates that past members of the Communist Party may terminate their membership therein and thereupon become eligible truthfully to sign the affidavit.

The admitted fact that the defendant had been a member of the Communist Party, no matter how active or important, until August, 1949, cannot support a finding that [fol. 1256] the affidavits he signed in December, 1951 and December, 1952 were not truthful. There is no presumption of continued membership in the face of the signing of the affidavits and it is necessary for the Government, in order to support its burden of proof, to show beyond a reasonable doubt that the defendant was a member of the Communist Party as defined above at the time that he signed the affidavits in December, 1951 and December, 1952. No inference of continued membership can be drawn by you on the basis of past membership in the face of his having signed the affidavits, since such an inference would be inconsistent with the presumption of innocence.

The witness, Kenneth Eckert, testified that a member of the Communist Party could not leave the Party, that he got out only by expulsion. Unless from other evidence in the case, you are convinced beyond a reasonable doubt that there was such a rule or policy in August, 1949, and that the defendant knew of the rule or policy at that time and had himself agreed with or accepted, or approved, or adopted it, this testimony of the witness, Kenneth Eckert, about such a rule or policy should not be considered by you as evidence against the defendant and should be disregarded and given no consideration by you in your deliberations.

The witness, Kenneth Eckert, also testified on direct examination that he was expelled by the Communist Party in 1948. However, since it was brought out on cross examination of Eckert that his testimony that he was expelled was based on what he read in leaflets and in a newspaper, and since there is no evidence that the defendant had anything to do with the termination of Eckert's membership in the Communist Party, or that the defendant ever knew of the termination, or that the defendant ever knew of any rule or policy of the Communist Party with respect to how membership could be terminated, or that the defendant agreed with or accepted, or approved, or adopted any such policy, the testimony of the witness, Kenneth Eckert, about his expulsion should not be con-

sidered by you as evidence against the defendant and should be disregarded and given no consideration by you in your deliberations.

However, even if you find that the defendant's resignation from the Communist Party in August, 1949 was not in fact a true resignation, either because of the rule or policy about which Eckert testified or because of some [fol. 1257] understanding about the matter between the defendant and the Communist Party, such a finding would not permit you to draw the inference that either his 1951 affidavit or his 1952 affidavit was false. As I have said, there is no inference or presumption that his membership in the Communist Party in August, 1949 continued until December, 1951 and December, 1952 in the face of his signing of the affidavits at those times. Such an inference or presumption would violate the presumption of innocence. As I have also told you, the prosecution must show membership beyond a reasonable doubt on and after December 19, 1951 on count one and on and after December 3, 1952 on count two.

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION No. B.

Membership in the Communist Party is a formal relation between an individual and the Communist Party which is defined by the rules and regulations of the Communist Party.

The Communist Party, like other voluntary organizations, sets forth the conditions which a person must accept in order to become and remain a member. The burden is on the prosecution to prove beyond a reasonable doubt what the conditions were for membership in the Communist Party, whether found in its Constitution or elsewhere, on and after December 19, 1951, under the first count, and on and after December 3, 1952, under the fourth count, and that the defendant accepted those conditions on and after December 19, 1951, under the first count, and on and after December 3, 1952 under the fourth count. You must acquit the defendant as to either or both of these

counts, as the case may be, if these matters have not been proved beyond a reasonable doubt.

In addition, you must acquit the defendant as to either or both of these counts, as the case may be, unless the evidence proves beyond a reasonable doubt that on and after these two dates, he desired to belong to the Communist Party and that the Communist Party considered him a member.

In addition, for a person to be a member of the Communist Party, certain actions are usually required, such as paying dues, attending meetings, and doing the work [fol. 1258] of the Communist Party. You must acquit the defendant as to either or both of these counts, as the case may be, unless you are convinced beyond a reasonable doubt that the defendant engaged in such actions on and after these two dates.

Not every relation between an individual and an organization constitutes membership. An individual may be sympathetic, or agree with, all or part of the program of an organization, and cooperate actively with it and still not be a member.

Isolated acts of the defendant, showing cooperation with the Communist Party, or isolated statements of the defendant, showing sympathy with the Communist Party or with its aims or policies, are not evidence of membership.

If at the time of signing the affidavits, the defendant did not believe himself to be a member of the Communist Party, as I have defined membership, you must find him not guilty on either or both counts one and four, as the case may be.

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION NO. C.

Affiliation, as used in counts two and five, is not the same as membership. It is something less than membership and something more than mere sympathy.

Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of con-

duct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith.

Affiliation is more than a mere course of conduct. It is a factual and formal relationship.

Mere cooperation with an organization, or intermittent or repeated acts of support, do not establish affiliation. Mere cooperation or support do not constitute affiliation.

To constitute affiliation there must be a status of mutual recognition and dependability on the part of the organiza-
[fol. 1259] tion and the individual. If any of these elements is lacking, there is no affiliation.

Affiliation is a question of intent, and unless both the individual and the organization intended such a relationship to exist at a particular time, there is no affiliation with that organization.

Whether intermittent or repeated, the act or acts tending to prove affiliation and that both the defendant and the Communist Party intended such a relationship to exist on these dates, must be of that quality which indicates an adherence to or a furtherance of the illegal purposes or objectives of the ~~proscribed organization~~ Communist Party [Handwritten notation] as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the illegal program to fruition. Unless there is evidence which convinces you beyond a reasonable doubt of some illegal purpose or objective of the Communist Party on these dates and that the relationship between the defendant and the Communist Party on and after these dates was a relationship based on the illegal purpose or objective, you must acquit the defendant on either or both of these counts, as the case may be.

If at the time of signing the affidavits, the defendant did not believe himself to be affiliated with the Communist Party, as I have defined affiliation, you must find him not guilty on either or both counts two and five, as the case may be.

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION NO. D.

The defendant requests the conventional instructions regarding the presumption of innocence, burden of proof and reasonable doubt, inferences to be drawn from the fact of indictment, but requests that the usual instruction about circumstantial evidence be omitted and that the jury be instructed that the so-called perjury rules of evidence are applicable to this case, as follows:

The prosecution must establish the alleged falsity of the [fol. 1260] statements made by the defendant on each of the four counts by the testimony of two independent witnesses or by one witness and corroborating circumstances. Unless this has been done on any count, you must find the defendant not guilty on that count.

You cannot find the defendant guilty on any count if the proof of falsity is merely circumstantial.

If the falsity of any statement is supported by the testimony of only one witness with evidence of corroborating circumstances, you must find the defendant not guilty unless the corroboration is by proof of independent and material facts and circumstances tending directly to corroborate the testimony of the witness for the prosecution; and such proof must be of a strong character and not merely corroboration in slight particulars. Furthermore, the testimony of the prosecution's witness must contradict in positive terms the statement of the defendant or you cannot find the defendant guilty.

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION NO. F.

The witness, William Mason, was an informant for the Federal Bureau of Investigation at all or some of the times that he had his conversations with the defendant during the years 1949 to 1953. In view of the fact that Mason was an informant for the Federal Bureau of Investigation, his testimony must be examined with greater scrutiny and care than the testimony of an ordinary wit-

ness for the purpose of determining whether his testimony was colored by his relationship with the Federal Bureau of Investigation.

R covered by general instruction
Pg. 5 [Handwritten notation]

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION No. K.

Unless you find beyond a reasonable doubt that the [fol. 1261] alleged false, fictitious and fraudulent statements and representations made by the defendant were material, you must acquit the defendant under these counts.

You are instructed as a matter of law that the word "material", as used in each of the four counts in the indictment, means that the International Union of Mine, Mill and Smelter Workers utilized the services of the National Labor Relations Board during the year for which each of the two affidavits was filed. To put it another way, it means that the International Union of Mine, Mill and Smelter Workers must have filed charges of unfair labor practices or participated in representation cases in each of the two years.

Unless you find from the evidence that the International Union of Mine, Mill and Smelter Workers did use the services of the National Labor Relations Board, in the way I have just said, during the year from December, 1951 to December, 1952, you must acquit the defendant on counts one and two.

Unless you find from the evidence that the International Union of Mine, Mill and Smelter Workers did use the services of the National Labor Relations Board, in the way I have just said, during the year from December, 1952 to December, 1953, you must acquit the defendant on counts four and five.

R—last 3 paragraphs do not state
the law [Handwritten notation]

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION No. L.

Membership in the Communist Party is a different status than affiliation with the Communist Party. Membership is one relationship to an organization, and affiliation is another. It is therefore impossible for a person, at one and the same time, to be both a member of the Communist Party and affiliated with it. I therefore instruct you that if you find the defendant guilty under either count one or two relating to his 1951 affidavit, you must acquit him on the other count, and if you find him guilty under either count four or five relating to the 1952 affidavit, you must [fol. 1262] acquit him on the other count.

R.—confusing and question to be considered after verdicts returned [Handwritten notation]

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION No. M.

With respect to each of the four counts you must find beyond a reasonable doubt not only that the statement of the defendant was false, but that the defendant knew it to be false at the time he signed the affidavit.

In other words, even if you should find the defendant was in fact a member of the Communist Party or affiliated with it on or about December, 1951 and December, 1952, you must find him not guilty unless you also find that at those times he believed that he was a member of the Communist Party or affiliated with it.

The law is that a person's mental state can be tested only by the outward manifestations exhibited by his conduct. These are what the law regards as overt acts. In other words, in order for you to find the defendant guilty with respect to any of the counts in the indictment, you must find that the defendant performed such overt acts which constitute membership or affiliation to such an extent that it would justify you in concluding beyond a reasonable

doubt that the defendant knew at the time he signed the affidavits that the statements contained in them were false.

R.—properly covered by given ins.
Some not the law
[Handwritten notation]

[fol. 1266]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—November 17, 1958 (omitted in printing)

[fol. 1267]

IN UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5879—November 1958 Term

MAURICE E. TRAVIS, Appellant,

—v.—

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Nathan Witt of New York, New York, for Appellant.

Donald E. Kelley, United States Attorney and Paul C. Vincent, Attorney, Department of Justice (Phillip R. Monahan and Anthony A. Ambrosio, Attorneys, Department of Justice, were with them on the brief), for Appellee.

Before: Phillips, Murrah and Lewis, Circuit Judges.

LEWIS, Circuit Judge:

OPINION—August 3, 1959

[fol. 1268] This action is here on appeal for the second time. On the first appeal,[1] this court set aside a conviction

[1] Travis v. United States, 10 Cir., 247 F.2d 130.

under the false statement statute, 18 U.S.C.A. 1001,[2] and ordered a new trial because of prejudicial error committed when the prosecutor was allowed to improperly cross-examine appellant's character witnesses. The present appeal is from a second conviction after retrial of the case in the United States District Court for the District of Colorado. Reversal is sought upon a claim of insufficiency of the evidence to support the verdict and numerous assertions of prejudicial error committed during the trial. Appellant also challenges the constitutionality of 18 U.S.C.A. 3500 both as to its provisions and as construed and applied by the trial court.

The appellant, Maurice E. Travis, was convicted by a jury on four counts of an indictment charging him with falsely and fraudulently attesting that he was not an affiliate or member of the Communist Party in two "Affidavits of Non-Communist Union Officers" he executed as a national [fol. 1269] officer of the International Union of Mine, Mill and Smelter Workers.[3] The first affidavit was executed on December 19, 1951, and the other on December 3, 1952, and Mine-Mill filed them with the National Labor Relations Board in compliance with the provisions of Section 9(h) of the National Labor Relations Act as amended by the Labor Management Act of 1947 (29 U.S.C.A. 159(h).)[4]

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[2] "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[3] Hereafter called Mine-Mill.

[4] "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, * * * and no complaint shall be issued pursuant to a charge made by a labor organization * * * unless there is on file with the Board an affidavit executed * * * by each officer of such labor organization * * * that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. * * *"

Following conviction, appellant was fined $2,000 and sentenced to serve a four-year term of imprisonment on each of two counts of the indictment. No fine was imposed as to the remaining two counts, but he was sentenced to four-year prison terms on both to run concurrently with the terms imposed on the other counts. Thus, he was sentenced to a total of eight years in prison and fined $4,000.[5]

Since appellant challenges the sufficiency of the evidence [fol. 1270] we shall summarize that evidence urged by the government as ample basis for the jury verdict. This consists primarily of the testimony of three former Communist Party members who associated with Travis in various capacities as officers of Mine-Mill. Their testimony indicates that in 1942 Travis was employed by Mine-Mill as coordinator for the area of Northern California. He was at that time a member of the Communist Party with an assignment to carry on the Communist Party activities among the Mine-Mill workers in his area. Thereafter, he advanced to positions of prominent leadership in the Mine-Mill Union becoming Assistant to the President in 1946, Vice President in 1947 and President later that year. He has been Secretary-Treasurer of the Union from 1948 until the time of trial. There was extensive evidence of Travis's activities as a Communist Party member prior to 1949. No prolonged description of his actions will be undertaken here except to point out that as he progressed to positions of national leadership in Mine-Mill he was able to use those positions to further the interests of the Party. Illustrative of the scope of his activities is the evidence that in 1946 the Communist Party designated a group of its members who were prominent Mine-Mill leaders to coordinate the Communist activities within Mine-Mill with a view to controlling the union proper. Although not an official organization of Mine-Mill, this group became known as the "Steering Com- [fol. 1271] mittee." Travis was one of the initial members of the Steering Committee and its frequent meetings for planning Party strategy and organizing activities within the

[5] The judgment giving rise to the instant appeal differed from the judgment at the first trial in that fines of $2,000 were imposed on all four counts at the former trial making a total fine of $8,000.

Union were usually presided over by him "or some other ranking Communist official." His influence in these meetings was notable. On one occasion he stated to the other committee members that since the Party had gained a majority of votes on the Executive Board of Mine-Mill they should effect certain changes in Union staff and that previous actions taken by the anti-Communist faction of the Board should be reversed. These proposals were subsequently adopted by the Mine-Mill Executive Board. On another occasion Travis, as a member of the Steering Committee, participated with national officers of the Communist Party in planning strategy for the selection and support of Party-approved candidates for the international officers of Mine-Mill. The resultant strategy was later substantially carried out at a Mine-Mill national convention.

In 1947, Congress amended the National Labor Relations Act so as to restrict enjoyment of the collective bargaining advantages of its provisions to labor organizations whose officers had filed affidavits attesting that they were not members of or affiliated with the Communist Party. (29 U.S. C.A. 159(h)).

The government introduced into evidence a copy of a public statement made by Travis in the union paper by [fol. 1272] which he declared that he had resigned from the Communist Party in order to comply with the new Taft-Hartley amendment. It then undertook to show that the resignation was merely a pretense and that in fact Travis's membership in the Party continued during the period material to this conviction. The evidence in this regard delineated a Communist labor meeting in New York called to decide whether the Party would advocate that its members sign the non-Communist affidavits under the new law. It was decided that Party policy would be against signing. Appellant participated in that meeting. Later, when he reported the decision to Party members of his own union he asked his fellow Communist Gil Green if the teachings of V. Lenin, to the effect that Communists working inside trade unions must remain there at all costs, including the use of artifice or device to do so, were applicable to their situation. Green replied affirmatively and pointed out that labor leaders could circumvent the law by belonging to a "Thursday

afternoon social club" since the law pertained only to present membership and not past or future membership.

Following the passage of the non-Communist affidavit requirement of the Taft-Hartley law, the Mine-Mill Executive Board adopted a policy of non-compliance, thereby exercising its option as provided by the Act. Non-compliance, of course, resulted in inability of the union to receive the advantages of utilizing N.L.R.B. facilities for filing charges [fol. 1273] of unfair labor practices and participation in Board elections. When it became apparent that loss of advantages to the unions was causing difficulty, the Mine-Mill Executive Board by resolution reversed its previous position and adopted a policy of compliance. Travis was a member of the Executive Board when that decision was made. His statements to government witness Mason, set forth infra, at the time he wrote his "resignation statement" indicated that his action was in accordance with Communist Party policy. This resignation statement was published in the Union paper on August 15, 1949.[6]

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[6] Excerpts from this public resignation statement illustrate its general tenor:

"Since the interest of the International Union is uppermost in my mind, I have been confronted with the problem of resigning from the Communist Party, of which I have been a member, in order to make it possible for me to sign the Taft-Hartley affidavit. I have decided, with the utmost reluctance and with a great sense of indignation, to take such a step. My resignation has now taken place and as a result, I have signed the affidavit.

"This has not been an easy step for me to take. Membership in the Communist Party has always meant to me, as a member and officer of the International Union, that I could be a better trade unionist: it has meant to me a call to greater effort in behalf of the union as a solemn pledge to my fellow members that I would fight for their interests above all other interests. (Emphasis in original.)

"The very premise of the Taft-Hartley affidavits is a big lie, the same sort of lie that misled the peoples of Germany, Italy and Japan down the road to fascism. It is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union. On the contrary, trade unions are an integral part of a Socialist society, the kind of society in which Communists believe. Therefore, I believe that good Communists are good trade unionists."

[fol. 1274] The government evidence pertaining to appellant's continued Party membership after the resignation statement showed that in the fall of 1951 Travis used government witness Fred Gardner, who had been recently employed by Mine-Mill, to assist him in crossing the border into Canada. Travis explained to Gardner that he was having difficulty crossing the border because of his membership in the Party and the public resignation statement and that it would be easier to cross in Gardner's car because it would not be recognized by Canadian police. He stated that Gardner had come to him well recommended by the Communist Party of Cleveland, Ohio, and that he was glad of that. Travis expressed regret that his public resignation had been necessary in order for Mine-Mill to conform to the [fol. 1275] Taft-Hartley filing requirements and in discussing this he said that he " . . . believed it was a mistake because it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely to conform to the Taft-Hartley affidavits. . . ."

Relative to membership after execution of the first affidavit, (December 19, 1951), witness Mason testified that in March of 1952 Travis stated to him that the Soviet delegation at the World Federation of Trade Unions in Paris, France, was demanding that the "American left-wing

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"AT THE SAME TIME, I want to make it absolutely clear that my opinion continues to be that only a fundamental change in the structure of our society, along the lines implied in the very words of the charter of our International, 'Labor produces all wealth—wealth belongs to the producer thereof,' can lead to the end of insecurity, discrimination, depressions and the danger of war.

"I am convinced that capitalistic greed is responsible for war and its attendant mass destruction and horror, I am convinced it is responsible for depression, unemployment and the mass misery they generate. • • •"

• • •

"Therefore, I want to make it crystal clear that my belief in Communism is consistent with what I believe to be the best interests of the members of this Union and the American people generally and that I am especially happy to be able constantly to remember that it is consistent with the finest traditions of the International Union."

unions" who had been expelled from the Congress of Industrial Organizations form a "third federation." He said that the Communist Party had left it up to those in the unions to make the decisions and asked Mason what his view was. Travis expressed agreement with Mason's response that he opposed such a move and said that "the boys in the other unions" concurred and had left it to him, Travis, to communicate the reply to Paris.

The evidence postdating the execution of the second affidavit indicated that in March 1953 a staff conference of Mine-Mill was held in Denver, Colorado, for the discussion of organizational and political action. At this conference Travis handed to witness Mason a copy of the proposed conference agenda. Mason examined the outline of the legislative program contained therein which listed a number of items such as "repeal of the McCarran Act" and [fol. 1276] "fight against witch-hunting" and called Travis's attention to the fact that nothing was listed pertaining to betterment of workers. Travis agreed and directed that matters suggested by Mason be included. However, later that day, Travis told Mason "these other things, too, like repeal of the McCarran Act, are important, and he said 'When they get us Communists they will be after people like you if we don't get these laws repealed.' "

In June 1953, witness Gardner was to be transferred by Mine-Mill to a new assignment in the Coeur d'Alene Mining District of Idaho. Travis instructed him to stop in Denver, Colorado, on his way to Idaho for a "briefing on the Coeur d'Alene situation." Pursuant thereto, Gardner met with Travis in Denver and was told that because of a factional dispute between Communist Party members of Mine-Mill in Coeur d'Alene he was to "remain aloof" from Party activity until further notified. Travis stated that he felt assured that the dispute would be resolved by the expulsion of the leader of the faction opposing the Party regional officers and instructed Gardner that once the problem was resolved he would be contacted by someone whom Travis would identify to him beforehand and that at that time Gardner could reactivate himself in the party.

In August 1953, witness Mason had a conversation with Travis in Butte, Montana, in which he accused appellant

[fol. 1277] and his Communist Party associates of trying to undermine the leadership of Mine-Mill District Number 1 while they were in the midst of a bargaining conflict with employers. Mason stated that he was aware that this was done because the District 1 leadership opposed Communist domination of Mine-Mill, that some of the men in Montana were very angry about the situation and that he was addressing himself to Travis as the leader of the Party in the union. Appellant made no denials but suggested that he would like to take the matter up with the "boys in Denver." He suggested that Mason meet him in a few days in Denver to talk things over. In compliance Mason met Travis in Denver and again expressed his opposition to various activities in Mine-Mill including his view that the union paper constantly criticized the foreign policies of the United States without once attacking the position of the Soviet Union. Travis answered that Mason's position was in direct opposition to the Party and that he was not being realistic if he thought appellant could change the policies of the paper. Appellant continued, stating that the Communist Party leadership in Mine-Mill felt that there should be no compromises "and that he, Travis, is one of those in the Party who thinks that there have been too many compromises already, that [Mason did] not grasp the new situation, that the Soviet Union is becoming stronger, and that the position of the Communists in the Union has been stronger, we have been able to, he said, repulse the raid [fol. 1278] and hold this union and other unions." Mason threatened an open fight on the Communist issue and Travis pointed out that he would have seasoned fighters, the machine and the paper, to use against Mason in such a fight. Travis then concluded the conversation by telling Mason: "You and Joe [Mason's brother] were invited to get into the Party, had you done so, you would be sitting high in the councils of this organization with us, but you failed to do so."

Many of the points raised in appellant's brief were considered by this court in the recent case of Sells v. United States, 10 Cir., 262 F.2d 815, and need not again be treated at length. As to the evidentiary questions involved, the Sells case stands for the proposition that prosecution under

the false statements statute is not defeated by a temporary "resignation" for the purpose of signing the affidavits only. Evidence of active participation on a continuing basis both before and after the crucial time of signing and filing the affidavit is sufficient evidence from which the jury might infer that membership continued during the time in question.

Appellant has urged that the perjury rule of evidence must apply to convictions for false statements under Section 1001, 18 U.S.C.A., and that since the government's case is concededly circumstantial the evidence is legally insufficient to sustain the verdict, cf. Radomsky v. United States, [fol. 1279] 9 Cir., 180 F.2d 781; Spaeth v. United States, 6 Cir., 218 F. 2d 361. However, in the Sells case, this circuit followed the view of the 7th and 9th circuits, that the court-established rule governing the quantum of evidence required in a prosecution for perjury, viz., falsity of the statement must be shown by the testimony of two independent witnesses or other corroboration, is inapplicable to a prosecution under Section 1001. United States v. Killian, 7 Cir., 246 F.2d 77; Fisher v. United States, 9 Cir., 231 F.2d 99; Fisher v. United States, 9 Cir., 254 F.2d 302; see also Hupman v. United States, 6 Cir., 219 F.2d 243. Hence, the trial court did not err in submitting the case to the jury without instructing in accordance with the perjury rule.

The evidence of Travis's continued membership in the Party stands uncontradicted. Appellant made no attempt to affirmatively rebut the government evidence on that issue nor did he introduce evidence of his purported resignation. Instead, his defense consisted primarily in extensive cross-examination of prosecution witnesses in an endeavor to impeach and discredit their testimony. He also introduced the testimony of character witnesses as to his reputation for truth and veracity. Of course, the absence of rebutting evidence, in no way relieves the government from meeting the burden of proof. Nevertheless, it is a fundamental principle of appellate review in criminal cases that once the jury has concluded, as it did here, that the guilt of the [fol. 1280] accused was proven beyond a reasonable doubt, it is not the province nor the function of this court to weigh the evidence or to test the credibility of witnesses. United

States v. Green, 7 Cir., 246 F.2d 155. Furthermore, we are limited in the scope of our review to a determination of whether there is substantial evidence to support the verdict, Wilcoxon v. United States, 10 Cir., 231 F.2d 384, and must view the evidence in the light most favorable to the government, Evans v. United States, 10 Cir., 240 F.2d 695. With these principles in mind, a careful review of the voluminous record persuades us that the jury verdict is amply sustained by cumulative proof that appellant's Communist Party membership was not severed by the purported resignation and that he was a Party member on the dates crucial to this decision.

There is no necessity to consider the sufficiency of the evidence under the "affiliation" counts of the indictment because no fines were imposed thereon and the prison sentences on those counts were made to run concurrently with the prison sentences of the "membership" counts. Lawn v. United States, 355 U.S. 339 at 359, 78 S. Ct. 311, 2 L. Ed. 2d 321; Hirabayshi v. United States, 320 U. S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774; Roviraro v. United States, 353 U.S. 53 at 59, fn. 6, 77 S. Ct. 623, 1 L. Ed. 2d 639.

Appellant contends, but without merit, that the state- [fol. 1281] ments of the affidavits, shown by the evidence and found by the jury to have been false at the time they were made, were not "material" because the union did not utilize the N.L.R.B. procedures after recognition by the National Labor Relations Board. Recognition was granted the Mine-Mill as a result of the Travis filing among others, which indeed must have been his intent in filing, and the false statement was "capable of influencing the decision of the tribunal in making a determination required to be made," Weinstock v. United States, C.A. D.C., 231 F.2d 699, 701. The materiality of the false statement is tested not by the union's use of the N.L.R.B.'s facilities but by the union's achievement thereby of a status which carries with it the right to invoke the benefit of the National Labor Relations Act. Sells v. United States, supra.

The government's witness Eckert testified that during the time that he was a member of the Communist Party, 1931 to 1948, it was the continuing policy of the Party "that once having joined the Communist Party you could

not leave without being expelled." Defendant objected to the introduction of the evidence, asserting that the testimony was based upon opinion unsupported by facts, that it was unconnected in time with the date of defendant's resignation in 1949 or the filing of the affidavits in 1951 and 1952, and that it was an attempt by the government to impute guilt by association.

[fol. 1282] Most assuredly, the evidence was probative of the second side of the question of membership, i.e. whether the Party was willing to accept the defendant and recognize him as a member, and hence admissible, but without more it could show nothing of the state of mind of the defendant and could not show that he did not, in fact, resign from the Party on the date he claimed. As was said by Judge Bazelon in a special opinion written in Gold v. United States, 237 F.2d 764, rev. on other grounds 352 U.S. 985:

> "If no one can effectively resign from the Party, no union officer with appellant's history can ever comply with sec. 9 (h) and the statutory phrase 'is not a member' is precisely equivalent to 'has never been a member.' This possibility Douds specifically rejects." (See American Communications Association v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925.)

Defendant sought to have given to the jury an instruction which could be understood to limit the purpose of the admission of this testimony, but the trial court ruled that, considered with other evidence in the record, the evidence was relevant and probative of whether or not defendant's resignation was a true resignation or a mere sham to obtain the benefits of the National Labor Relations Act for Mine-[fol. 1283] Mill. Upon this premise, counsel argued to the jury that numerous persons, including the government's witnesses, had left the Party, regardless of the Party's policy.

Whether or not the jury could properly infer from the related evidence that the defendant continued to act in obedience to this policy and that his resignation was understood to be in form only determines whether the court was correct in refusing to circumscribe its use by the jury. I Wigmore, Evidence, sec. 13.

In 1948, a meeting in New York City was held among persons of significance in the trade unions and the Communist Party[7] including the defendant and the government witness Eckert, who related what transpired. The National Trade Union Secretary of the Communist Party presided and stated that the purpose of the meeting was to determine whether or not Communist officials in the unions should be granted permission by the Party to sign the non-Communist affidavits. Despite speeches protesting that the unions were not appearing on election ballots because of lack of compliance with the law, it was decided that Com- [fol. 1284] munist union men would not sign the affidavits. Travis's reaction to the decision was one of support and obedience. The Mine-Mill adopted the policy of not signing the non-Communist affidavits.

Subsequently, Travis told another government witness, Mason, that the union was becoming more and more concerned because of the losses of elections and that the Communist Party had been again discussing whether the Communist union officials should sign the affidavits. In a second conversation with Mason in July, 1949, Travis offered him a copy of his resignation statement, which was later published in the union's paper, and said that the statement had been cleared with Ben Gold and the Party people in New York. He told Mason that "the Party thinks this is the best policy for us in the unions to follow."

In October, 1951, Travis had a conversation with the witness Gardner: " . . . . we very briefly discussed his resignation from the Party in which he pointed out that he believed that resignation, that public resignation was a mistake because it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely

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[7] In attendance besides Travis and Eckert, were William Z. Foster, National Chairman of the Communist Party, Eugene Dennis, General Secretary, Ben Gold, a member of the Central Committee and an official of the Fur Workers Union, John Williamson, National Trade Union Secretary of the Communist Party, Arnold Johnson, Ohio State Secretary of the Party, and officials of the Farm Equipment Union, Furniture Workers Union and Electrical, Radio, and Machine Workers Union.

to conform to Taft-Hartley affidavits, and they recognized, the enemies of the Party recognized that this was not an actual resignation, . . . ".

Thus the evidence of the Party's policy was relevant in the interpretation of the defendant's statements and be-
[fol. 1285] havior, and is not analogous to the prohibited imputation drawn from membership alone that a member endorses fully all of the precepts of the Party. Cf. Schneiderman v. United States, 320 U.S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796; Nowak v. United States, 356 U.S. 660, 78 S. Ct. 955, 2 L. Ed. 2d 1948; Maisenberg v. United States, 356 U.S. 670, 78 S. Ct. 960, 2 L. Ed. 2d 1056.

The charge that Eckert's testimony on this point was opinion unsupported by facts going to the main issue results from a confusion in the record as to whether Eckert was testifying as an expert. Eckert's position of knowing what Party policy was during the time of his membership was shown through evidence similar to that customarily evoked to qualify an expert, but he testified as to a fact within his knowledge rather than giving an opinion as an expert.

The trial court did not instruct the jury that there was a presumption, in absence of contradicting evidence, either that the Party's policy of no resignations continued or that Travis's membership, having been admitted prior to the alleged resignation and inferentially shown subsequent to that time, continued during the time the affidavits were filed. The factual effect of the evidence was left to the jury. That body might well have drawn an inference unfavorable to appellant. See Jencks v. United States, 5 Cir., 226 F.2d 540, 547, rev'd on other grounds 353 U.S. 657.

[fol. 1286] Appellant urges that Eckert's testimony was remote, irrelevant and inflammatory because early in the proceedings defense counsel offered to stipulate that Travis had been a Party member from 1941 to August 1949 and Eckert could show no more than an adherence to Party principles until 1948. Since a man's state of mind must necessarily be shown from his statements and conduct, the prosecution bore the burden of demonstrating a continuation of activities and attitudes similar to those performed and held by Travis during the time of his admitted

membership after the date of his purported resignation. The evidence of how extensively, actively and zealously Travis had worked as a Party member and his leadership in the Party was clearly relevant to the question of whether or not the resignation was a mere pretense. If it is true that evidence of Communist Party activities has a tendency to provoke present-day juries toward prejudice, it is ridiculous to suppose that the attitude of the public against a crime will prevent its prosecution. If the evidence has probative value, it is ordinarily admissible regardless of an imagined reaction of the jury, Suhay v. United States, 10 Cir., 95 F.2d 890.

Appellant insists that the trial court improperly restricted his cross-examination of prosecution witnesses by not allowing him to show that witness Mason was a government informant through fear of deportation and that Eckert [fol. 1287] and Gardner were members of a labor organization with rival interests to those of Mine-Mill. As to Mason, the evidence showed that he had been a member of the Communist Party for a brief period in the early 1930's. In cross-examining Mason, defense counsel elicited the information that he had become a naturalized citizen in 1938 and that prior to his naturalization the United States Immigration and Naturalization Service had questioned him about his past Party membership. The defense then asked Mason if he was again questioned by that Service about the same matter in 1952. The government objected to the question as improper cross-examination and counsel were heard in chambers. The defense argued that it wanted to show that the witness had an interest in testifying. Counsel suggested that Mason knew that Congress passed the McCarran Act providing for deportation of aliens on grounds of past membership in the Communist Party and asserted that it sought to elicit evidence that government agents had held out promises or threats to Mason to induce him to testify. The government insisted that the purpose of the defense was merely to embarrass the witness. The court then addressed defense counsel as a member of the Bar of the Court and asked if he knew of anything which would substantiate the charge. Defense counsel responded that he had no knowledge of promises or threats but said he had been informed

that during the pertinent period the witness was very concerned about his status as an alien and was "going around [fol. 1288] asking people questions" about it. The court then sustained the government objection stating that it did not think the inference that there were threats or promises was warranted.

Cross examination of a witness is a matter of right, The Ottawa, 3 Wall. 268, 271, and cannot be circumscribed by the courts where the questions propounded are within the framework of his testimony on direct examination, except to the extent the witness himself claims privilege or constitutional protection. However, the demonstration of a witness's bias almost always requires a search of his conduct and the circumstances of his situation, which facts may be irrelevant to the issues at trial but important to the litigants as a safeguard against false or colored testimony. III Wigmore, Evidence, §943. Prolonged digressions from the matters at hand for the purpose of exploring the manners and morals, hopes and fears, beliefs and conflicts of a personality whose connection with the trial occurs merely because of his position as a spectator can as readily abort the process of justice as can a denial of the right of cross examination. Thus, it has long been held that the scope of cross examination seeking to discredit the witness may be reasonably limited by the court responsible for the trial of the case. In Blitz v. United States, 153 U.S. 308, 312, 14 S. Ct. 924, 38 L. Ed. 725, where a question seeking to impeach a deputy marshal was not permitted, the court stated:

> [fol. 1289] "The question was clearly irrelevant, and was properly excluded. The reasons, whatever they may have been, that induced the witness not to arrest the defendant when the latter voted the second time in the same election, did not throw any light upon the issue to be determined. If the object was to test the accuracy or credibility of the witness, it is quite sufficient to say that the extent to which a cross-examination may be allowed for such a purpose—especially where, as in this case, the question had no reference to any matter disclosed by the examination-in-chief—is largely subject to the sound discretion of

> the trial court, and the exercise of that discretion is not reviewable upon writ of error; certainly not where the question, upon its face, suggests nothing material to the inqury whether the defendant is guilty or not guilty of the specific offense charged in the indictment."

Certain classes of facts such as family relationship to a party have been held to so strongly give rise to inferences relevant to the witness's interest and bias as to leave no room for an exercise of discretion in admissibility. III Wigmore, Evidence, §948. Among these always admissible circumstances is the fact that the witness for the prosecu- [fol. 1290] tion is under indictment or in custody at the time of trial, Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624; District of Columbia v. Clawans, 300 U.S. 617, 57 S. Ct. 660, 81 L. Ed. 843. But these cases do not govern the situation of the witness Mason in the present case and, in fact, reaffirm the view of the Blitz case that, in the absence of an abuse of discretion, the decision of permitting or excluding extrinsic evidence for impeachment purposes rests with the trial judge. As stated by Professor Wigmore, new circumstances will constantly be presented as suggestive of personal prejudice and the trial court must determine whether from the conduct, language or circumstances of the witness a palpable hostility to one party or sympathy for the other is inferable.

The inference that the witness Mason was coercively influenced to testify by a power over him held by immigration officials requires imagination to be applied in disparagement of facts appearing in the record. Mason is a naturalized citizen, not an alien subject to deportation. If wild surmise permit the deduction that he had committed a fraud in his application for citizenship by concealing his membership in a subversive group, which might be used to return him to an alien status, such conjecture is dispelled by his revelations to the Service in 1938. Therefore, we find no abuse of discretion on the part of the trial court in excluding the question as to the witness's more [fol. 1291] recent contacts with immigration officials.

As to the cross examination of Eckert and Gardner, Appellant urges that it was error for the trial court to

sustain objections to questions concerning alleged rivalries between Mine-Mill and the labor organization then employing those two witnesses. The trial court in ruling on the matter expressed the view that any possible inference that could be drawn from a showing of such rivalry would be too remote to be relevant. In arguing that this was error, appellant cites authorities for the proposition that it is within the proper scope of cross examination to show that the witness is testifying for his employer,[8] that his employer has an interest in the recovery,[9] is employed by the law firm representing the party for whom he testifies,[10] or when his employer is a business competitor of the party against whom he testifies.[11] He also cites a decision of this court to the effect that it is proper to probe the employment of a witness where he is an adjuster for a group of fire insurance companies, possibly interested in the suit, where the action sought damages for negligent installation [fol. 1292] of a furnace.[12] However, none of those cases has gone so far as appellant asks that we go here. Each of those cases was a civil action in which the employer had some interest in the outcome of the suit. But this is a criminal action and it is brought against Travis, not against Mine-Mill. What appellant asks is that he be allowed to show rivalry between the unions in order to impute prejudice against Mine-Mill to the witness and then asks the jury to infer therefrom bias against Travis. It is not reversible error to restrict cross-examination questions having only a slight and indirect bearing on the bias and credibility of a witness. District of Columbia v. Clawans, supra. The trial court correctly ruled that the evidence was too remote to be admissible.

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[8] Central Truck Lines v. Lott, 5 Cir., 249 F.2d 722.

[9] Majestic v. Louisville and N.R. Co., 6 Cir., 147 F.2d 621.

[10] Lexington Glass Co. v. Zurich General Acc. and Liab. Ins. Co., Ky. App., 271 S.W. 2d 909.

[11] Manley v. Northumberland County, D.C.M.D. Pa., 32 F. Supp. 775.

[12] Theurer v. Holland Furnace Co., 10 Cir., 124 F.2d 494.

Appellant next complains of the instructions to the jury concerning the meaning of membership in and affiliation with the Communist Party.[13] He argues that the definition

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[13] The trial court instructed the jury as follows:

"Whether or not the defendant was a member of the Communist Party at the times alleged in the indictment is a question of fact which you are to determine from all of the evidence in the case. In determining this question you must bear in mind that the burden of proof rests on the Government to prove the defendant guilty beyond a reasonable doubt. Membership or lack of membership in the Communist Party may be established by direct as well as circumstantial evidence.

"Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those [fol. 1293] person(s) who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

"Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the times alleged in the indictment, you may take into consideration the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

"In determining whether or not the defendant was a member of the Communist Party at the times alleged in the indictment, you may take into consideration whether the defendant: 1. Has made himself subject to the discipline of the Communist Party in any form whatsoever; 2. Has executed orders, plans, or directives of any kind of the Communist Party; 3. Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party; 4. Has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the organization; 5. Has been accepted to his knowledge as an officer or member of the Communist Party or as one to be called upon for services by other officers or members of the organization; 6. Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans

[fol. 1295] of "membership" used by the court was so all embracing and vague as to be meaningless destroying as a consequence any distinction between "membership" and

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of the Communist Party; 7. Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization; 8. Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization; 9. Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the Communist Party or to anyone else in behalf of the objectives of the organization; 10. Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization; 11. Has in any other [fol. 1294] way participated in the activities, planning, actions, objectives, or purposes of the organization.

"These are some of the indicia of Communist Party membership but you are not limited solely to those I have enumerated. As sole arbiters of the facts it is your duty to consider all the evidence either direct or circumstantial which bears upon the question of whether or not the defendant was a member of the Communist Party on the dates alleged in the indictment.

"In determining this question, you must bear in mind that the burden of proof rests upon the Government to prove the defendant guilty beyond a reasonable doubt. If you find that the Government has sustained this burden by proving beyond a reasonable doubt, that the defendant was a member of the Communist Party on December 19, 1951, and December 3, 1952, as alleged in the indictment, and if you find also that the Government has proved beyond a reasonable doubt the other essential elements of the offense charged in the first and fourth counts of the indictment, as I have outlined them to you, then you must find the defendant guilty as to the first and fourth counts.

"If, however, you find that the Government has not sustained the burden of proving beyond a reasonable doubt that the defendant was a member of the Communist Party on the dates alleged in the indictment, then you must find him not guilty as to the first and fourth counts.

"'Affiliation' as used in the second and fifth counts of the indictment is not the same as membership. The word 'affiliated', as used in the second and fifth counts of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member, when there is shown to be a close

"affiliation." We see no substance to this contention. In charging the jury with respect to the components of Communist Party membership and affiliation the trial court carefully followed the directions of this court expressed in the opinion on the first appeal.[14] The instructions were meaningful and clear. They included 11 of the 14 indicia of membership outlined by Congress in Section 5 of the Communist Control Act of 1954 (50 U.S.C.A. 844) and emphasized the primary element of membership as suggested by Mr. Justice Burton in Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed., 2d 1103, i.e.: ". . . there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member." This adequately outlined the kind of acts that could be considered evidence of membership and included the idea of the continuing reciprocal relationship necessary for that status.

The jury was told that Travis's membership in the Communist Party at the times alleged in the indictment was [fol. 1296] to be determined from "all the evidence in the case" and they were not limited solely to consideration of the indicia of membership enumerated by the court. However, this in no way indicates, as appellant contends, that the jury was told it was free to consider anything in

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working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite period upon a fairly permanent basis.

"'Affiliation' includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving a reasonable cause for the charge of a breach of good faith.

"Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you, ladies and gentlemen, are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence." (Record 1228-1230.)

[14] 247 F.2d 130, at 135 and 136.

evidence as proof of membership. The court went on to clarify: ". . . it is your duty to consider all the evidence . . . *which bears upon the question of whether or not the defendant was a member of the Communist Party on the dates alleged in the indictment.*" (Emphasis added.) Furthermore, it must be presumed that the jury, after such careful instructions on the components of membership, is perfectly capable of separating evidence which tends to prove membership from evidence which does not. Appellant also argues in this connection that the instructions left the jurors free to use single items of evidence standing alone as the basis for their findings. Such was not the case. They were instructed that isolated acts or statements were circumstances they could consider, but were cautioned that these were not in themselves conclusive proof of membership and were only to be considered in connection with the other evidence, that they were to weigh all the evidence bearing on the crucial issues, and that the government retained the burden of proving guilt beyond a reasonable doubt.

Nor is there any merit to the contention that the jury was left free to infer membership at the time of signing [fol. 1297] the affidavits from appellant's past Party membership or from the conclusion that the resignation was not honest. The instructions clearly contravene this argument:

> "The crucial issue of fact in this case is whether on December 19, 1951, and December 3, 1952, Maurice E. Travis was or was not then a member of the Communist Party or affiliated with such party.
>
> "The affidavits do not call upon any person to state whether or not in the past he has ever been a member of the Communist Party or affiliated with it. A person who has been at some time in the past either a member of the Communist Party or affiliated with that Party but who has terminated such membership or affiliation prior to the making of the affidavits would be entitled to sign the affidavits under oath without violating the law.
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> "Since the affidavits speak in the present tense only, the fundamental issue of fact for you to decide is

whether or not at the times alleged in the indictment the defendant knowingly and wilfully used an affidavit which was false and which he knew to be false at that time."

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"You may not presume the existence of a fact and [fol. 1298] then infer from such presumed fact the existence of any other fact or circumstance. You may not infer from any presumed fact or facts that the defendant is guilty of any of the offenses charged in the indictment."

It is urged that the trial court should have clarified what bearing the pre-affidavit and post-affidavit evidence had on guilt and that it should have pointed out which evidence was relevant to each affidavit. We do not agree. The court should not be required to emphasize particular portions of the evidence. To require trial courts to suggest to the jury the inferences which may be drawn from the evidence would be to invite error. Radius v. Travelers Ins. Co., 9 Cir., 87 F.2d 412. Further, it would be an invasion of the province of the jury to judicially measure the weight of circumstances which the jury can determine equally as well. Majestic v. Louisville & N. R. Co., 6 Cir., 147 F.2d 621.

Further error is alleged in the refusal of the court to give several requested instructions. We shall not lengthen this opinion by discussing appellant's many contentions in this regard. It is sufficient to say that the instructions given to the jury were complete and proper. Moreover, the jury was admonished with particularity as to all the safeguards that should properly surround a criminal prosecu- [fol. 1299] tion. The rejected instructions added no proper charge which was not covered by those actually given and there was no error in refusing to give them.

After each of the government witnesses had testified on direct examination at the trial, appellant moved that the prosecution be required to produce all reports and statements previously made by those witnesses to any agent of the government as provided under 18 U.S.C A. 3500. The motions were granted but since the government claimed that

the statements of each witness contained matter not related to the subject matter of his testimony as a witness, the trial court, pursuant to Section 3500(c), examined the statements *in camera* and excised the unrelated matters before delivering them to appellant.

Appellant's claims anent the constitutionality of section 3500 were examined fully in the Sells case, supra. Inasmuch as the availability to the defense of documents held by the government is limited under the decision of Gordon v. United States, 344 U.S. 414, 73 S. Ct. 369, 97 L. Ed. 447, and Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, to matters relevant to the testimony of a witness for the prosecution, Section 3500 merely provides the procedure by which that relevancy may be determined and deprives the defendant of nothing to which he was formerly entitled. Of course, the excised portion of a statement must be available for review to test the correct-[fol. 1300] ness of the trial court's judgment in eliminating it from consideration by the defense.

The United States Supreme Court has held in recent decisions, Palermo v. United States and Rosenberg v. United States, decided June 22, 1959, that Section 3500 is constitutional and governs the rights of a defendant to the production of documents in the hands of the prosecution. Further, the court approved the *in camera* inspection by the trial court as the proper procedure to be followed in determining the application of the statute to the particular statements sought by the defense. We have carefully examined and compared the complete documents and the documents as they were submitted finally to the defense and conclude that the only excised portions related to matters and persons not connected with the present case.

Counsel for appellant has skillfully anticipated a great many problems which will yet arise before the administration of Section 3500 is stabilized by precedent. Most of these problems are not made ripe for decision under the present case.

Appellant suggests that the trial court delegated its responsibility for the determination of whether or not certain documents contained "statements" within the purview of Section 3500(e) which should be made available to the de-

fense. He contends that if the prosecution determines that no part of a statement relates to the subject matter or, if it [fol. 1301] does, that it is not a "statement" as defined in subsection (e), then the trial court never inspects the statement at all and it is not preserved for the record. "There is appellate review if only part of a document is withheld from the defense; none, if the entire document is withheld." This problem was foreseen by the United States Supreme Court in the Palermo case, supra, and the production by the government of doubtful writings and in camera determination of the subject matter and whether it comes within the definition of "statement" of subsection (e) was approved. This ruling, however, does not aid appellant for the record shows merely that the three witnesses, Eckert, Mason, and Gardner, had talked with government attorneys in preparation for this case and that Eckert had talked to an investigator for a congressional committee. The subject of these conversations was Travis and Mine-Mill, but there is nothing in the record to indicate that these witnesses had in these instances written, signed, adopted or approved any writing or that any recording was made of any oral statement made to these agents. It is presumed that these agents took notes or made summaries of their conversations with the witnesses but such interpretations would not be "statements which could properly be called the witness' own words," Palermo v. United States, and the witnesses denied signing or adopting any such statements.

Appellant moved for the production of the witnesses' [fol. 1302] testimony before one or more grand juries. The theory that either the Jencks decision, Jencks v. United States, supra, or the Jencks Act, Section 3500, encompass grand jury testimony was discarded in Pittsburgh Plate Glass Co. v. United States (U.S.) decided June 22, 1959. Unlike the appellant in that case, however, appellant here moved the court for inspection of the grand jury minutes as a matter of right and alternatively to have the minutes produced for the court's examination and determination whether inconsistencies appeared between the witness's testimony before the grand jury and his testimony at trial.

Thus, the question here is the one particularly left undecided by the Pittsburgh Plate Glass case: Whether the

trial court may, in the discretion granted him under Rule 6 (e), Fed. Rules Crim. Procedure, refuse to examine the transcript of the grand jury when requested to do so. Rule 6 (e), provides:

> "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in con-
> [fol. 1303] nection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. . . ."

It has been held that instances when the need for disclosure of grand jury proceedings outweighs the countervailing policy maintaining the secrecy of such proceedings must be shown with particularity, United States v. Procter & Gamble Co., 356 U.S. 677, 78 S. Ct. 983, 2 L. Ed. 2d 1077. The burden is on the defense to show that "a particularized need" exists for the minutes which outweighs the policy of secrecy, Pittsburgh Plate Glass Co. v. United States, supra. Thus, where some portion of a defendant's testimony was impeached by the government's use of her grand jury testimony, it has been held that the trial court should make an inspection of all of her testimony for the purpose of disclosing other inconsistencies to the use of a co-defendant, United States v. H. J. K. Theatre Corporation, 2 Cir., 236 F.2d 502, but this is a far cry from requiring a trial court to examine all of the testimony of all of the witnesses for the prosecution upon the defense's hope of thereby uncovering some inconsistency. In view of prior statements of these witnesses made available to the defense, in which there appeared no suggesti of material inconsistency, it is un-
[fol. 1304] likely that their statements to the grand jury occurring at a time between the giving of such statements and consistent statements upon trial would produce im-

peaching material. Appellant shows inaccuracies in the testimony of the witnesses (i.e. Gardner thought he had testified in another case the prior week but actually it was two weeks earlier; Eckert had testified on seven previous occasions against Mine-Mill but his testimony as to details was not precisely the same on each occasion; Gardner's evidence at trial was not shown on the reports which he made to the F.B.I.; Mason stated to the F.B.I. that he was "unable to enlarge" on information about appellant, but at trial gave other specific information); these inaccuracies might well give rise to argument concerning the witnesses' memories and powers of observation which were available to the defense from the materials produced by the government. They do not demonstrate a reason for believing that the witnesses' testimony was biased or impeachable on material fact. They do not compel the conclusion that the testimony before the grand jury requires further investigation.

Since the permission or refusal of a defense inspection of grand jury minutes rests in the discretion of the trial court, United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129, and since no showing was made of a particularized need for the grand jury minutes in the maintenance of the defense, Pittsburgh Plate Glass [fol. 1305] Co. v. United States, supra, we hold that the trial court did not abuse its discretion in failing to order the production of grand jury minutes in this case where difficulties have arisen not from the paucity of evidence but from its plethora.

Affirmed.

MURRAH, dissenting.

In the first place, I would apply the perjury rule for the reasons so well stated by Judge Bazelon in Gold v. United States, 237 F. 2d 764. As in that case, the charge is false swearing, the evidence is indeed indirect and circumstantial, and in my judgment inconclusive. The only reason assigned for the inapplicability of the ancient and accepted perjury rule requiring direct and positive evidence of guilt, is that in cases of this kind, its application would

"merely thwart the attainment of the end which Congress sought to accomplish by the enactment of Paragraph 9(h)." See Sells v. United States, 262 F. 2d 815. But there is nothing in the legislative history of Section 9(h) to indicate that the Congress entertained the view that the perjury rule was inapplicable to prosecutions under Section 1001, as in Section 1621. See Judge Bazelon in the Gold case, Note 17. While feeling myself bound by the pronouncements of my court in the Sells case, I cannot refrain from [fol. 1306] expressing the hope that such is not the law in cases of this kind.

I would reverse this case and remand it for a new trial for the refusal of the trial court to examine the grand jury evidence in camera, to determine whether the lid of secrecy ought to be lifted in the interest of the proper administration of criminal justice. We know that grand jury testimony may be disclosed only upon a showing of a particularized need, and the burden of showing that need is on the one seeking it. But if the rule is to have any efficacy, its burdens ought not to be insurmountable.

How then may the accused lay a foundation for requisite inconsistency when he does not have access to the testimony or any other means except cross examination in the hope that something will turn up? In our case the cross examination of the prosecuting witnesses disclosed that they had testified in numerous cases of this kind, as well as before the grand jury which had indicted the accused. There were some inconsistencies in the testimony they had given in other open proceedings. But there was no conceivable way of showing a particularized need unless the accused could get the grand jury testimony before the court.

It is for these reasons that we have committed to the trial court the judicial function of determining ex parte [fol. 1307] whether the testimony of the witnesses is substantially consistent. And, the court cannot exercise that important function unless he knows something of the witnesses' testimony. It would seem therefore that the trial court erroneously and prejudicially refused to take a judicial look at the grand jury testimony. Cf. United States v. Spangelet, 258 F.2d 338. It may be that we would be

justified in having the grand jury testimony certified for examination here, as was done in United States v. Lev, 258 F.2d 9. Unless it is done, I certainly can't say that it was harmless error to refuse to look at it.

This case is important, not only to the accused here, but as a guiding precedent in other cases. I do not believe we can dispose of the question by simply saying that it was harmless.

[fol. 1308]

IN UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Before Honorable Orie L. Phillips, Honorable Alfred P. Murrah and Honorable David T. Lewis, Circuit Judges.

JUDGMENT—August 3, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Maurice E. Travis, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

[fol. 1309]

IN UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5879

MAURICE E. TRAVIS, Appellant,

—vs.—

UNITED STATES OF AMERICA, Appellee.

PETITION FOR REHEARING—Filed August 13, 1959

Appellant, by his attorney, respectfully petitions for rehearing, and in support thereof, shows:

I. The judgment affirming the conviction was entered on August 3, 1959, at which time an opinion was filed, together with a dissenting opinion by Judge Murrah.

II. The opinion of the Court should be reconsidered with respect to appellant's contention "that the trial court improperly restricted his cross-examination of prosecution witnesses by not allowing him to show that witness Mason was a government informant through fear of deportation and that Eckert and Gardner were members of a labor organization with rival interests to those of Mine-Mill" (p. 22).[1]

A. In upholding the ruling of the District Court with respect to the cross-examination of the witness Mason, the [fol. 1310] opinion correctly states that Mason is a naturalized citizen who can be denaturalized only on the ground of fraud in connection with his prior Communist Party membership. Since he had not concealed his membership when he was naturalized, he had not committed any fraud and the defense therefore was seeking to make a showing which is belied by the record (pp. 25-26).

[1] References in this form, unless indicated otherwise, are to the typewritten copies of the opinion. Printed slip copies were not available when this petition was being prepared.

This analysis, however, misconceives appellant's argument. The argument is not that Mason was legally subject to denaturalization under the immigration laws. The Court is of course correct in concluding that he was not. The argument the defense made on the trial was that, whatever the law provided, the defense had information that following the passage of the McCarran Act of 1950, providing for the deportation of aliens because of past membership in the Communist Party, Mason was fearful of denaturalization and then deportation, even though, as a matter of law, there were no grounds for his fear (R. 939-941).[2] And the fact that the Immigration and Naturalization Service did in fact interrogate Mason in 1952 about his past membership, even though there was no legal basis on which he could be denaturalized, would account for Mason's concern and the fact that he then became an FBI informant.

Whatever the law provided, then, Mason was concerned about the matter and it was the government itself which had generated or had helped generate or stimulate his concern. In these circumstances, it was error not to permit the defense to show, first, that Mason had been worried about the matter even though there was no cause for him to have been, and second, that his worry led him to become an informant and to give information and testimony about appellant (Appellant's Brief, pp. 44-45).

B. With respect to the limitation of cross-examination of Eckert and Gardner, the opinion of the Court overlooks one aspect of the *Clawans* case, 300 U.S. 617, which the opinion cites on the problem of the scope of cross-examination in general (pp. 25, 27) and neglects altogether to consider the effect of *Lee Way Motor Freight, Inc.* vs. *True*, 165 F.2d 38, in this Court, or even to cite it, even though it was the leading case on the matter discussed in appellant's brief (pp. 49-50).

[fol.1311] *Clawans* was a criminal case and it was there held that it was error not to permit the defense to show that, by reason of the nature of their employment, witnesses for the prosecution were interested in having the defendant

[2] References in this form are to the transcript of record on appeal.

convicted. 300 U.S. 617, 630-631. The distinction made in the opinion of the Court between civil and criminal actions (p. 27) is therefore without foundation.

Secondly, in light of the *Lee Way Motor Freight* case, it is difficult to see how it can be concluded that the matter of the employment of Eckert and Gardner by labor organizations rival to Mine-Mill had "only a slight and indirect bearing" on their bias and credibility (p. 27). If, as the opinion in the *Lee Way Motor Freight* case says, a witness may be asked if he has a bitter feeling against the cross-examiner because of other litigation in which the witness was interested and in which the cross-examiner represented one of the parties, it is difficult to see how the employment of Eckert and Gardner had "only a slight and indirect bearing" on their bias and credibility in this case.

Furthermore, common experience (illustrated by this very record) teaches us that rivalries and hatreds in the labor movement are passionate and intense and that organizational rivalries and personal enmities go together. We need not go back 20 years to recall the feud between John L. Lewis and William Green. It was difficult to distinguish the feud between the AF of L and the CIO, on the one hand, and the personal hatred of the two men, on the other. Who, reading almost any day's newspaper, doubts that George Meany or Walter Reuther would not be altogether objective and impartial if called upon to give testimony against James Hoffa in a criminal prosecution? How, then, can it be concluded that the rivalry between the United Auto Workers and the Hod Carriers, on the one hand, and Mine-Mill, on the other, would not affect the feelings of Eckert and Gardner in giving testimony against Travis?

It denies the facts of life, then, to conclude that Mine-Mill would not be affected by the outcome of the prosecution of Travis. In other words, it is unreasonable to conclude that the relationship is "remote," in the same way as it would be to conclude that a conviction of Hoffa would have no bearing on the fortunes of the Teamsters Union.

III. There is no need to burden the Court by rearguing at length the improper procedure followed by the District

Court in connection with 18 U.S.C.A. 3500. We desire only [fol. 1312] to point out that, with respect to the matter of statements made by the three witnesses to government attorneys and to a congressional committee investigator, it was improper to place on the defense the burden of showing that these were "statements" as defined in subsection (e). As the Supreme Court said in *Palermo*, the prosecution must produce "statements" without any preliminary showing by the defense that they exist. In this case, the prosecution refused to say whether the witnesses had made "statements" to the attorneys and to the investigator on the ground that they are not "agents" within the meaning of Section 3500. Instead of ruling on that point, the District Court insisted that the defense had to show that there were "statements" of that character first (R. 527). The prosecutor took one position, the District Court took another. They were both in error and, as a result, the prosecution was able to evade its responsibility under Section 3500 by not being required to advise the Court whether there were "statements" of this nature. The opinion of this Court, insofar as it also places on the defense the burden of showing there are "statements" which the prosecution has failed to produce (p. 36), is not consistent with *Palermo*.

IV. Insofar as the production of grand jury testimony for the purpose of impeachment is concerned, the opinion of the Court (pp. 36-40) misinterprets the *Pittsburgh Plate Glass* case in two respects.

In the first place, it is not accurate to say that "the question here" is the one left undecided by the *Pittsburgh Plate Glass* case, that is, whether the trial court should have examined the grand jury testimony (p. 37). Since the defense moved for direct production and, alternatively, for production to the District Judge, and since the *Pittsburgh Plate Glass* case holds that both procedures lie in the discretion of the trial court, this Court should have decided whether discretion was properly exercised in both respects. Instead, the opinion of the Court proceeds on the unspoken assumption that *Pittsburgh Plate Glass* decides that direct production to the defense is never appropriate and goes on to deal only with the alternative motion.

The second misinterpretation proceeds from the first. The opinion of the Court states that the defense must show "a particularized need" for inspection by the trial court (p. 38). But Mr. Justice Clark's opinion in the *Pittsburgh Plate Glass* case makes it clear that this showing is required [fol. 1313] when the issue relates to direct production to the defense, not when the issue is whether the trial court should examine the testimony first. The only reasonable conclusion is that inspection by the trial judge supplies what a showing of "particularized need" does to justify direct production.

In this connection, the opinion of the Court neglects to deal with appellant's contention that the trial court, by foreclosing all inquiry of the witnesses about their grand jury testimony, made it impossible for the defense to show "a particularized need." Even if the matter of production, directly to the defense or preliminarily to the trial judge, lies in the discretion of the trial judge, it is difficult to see how the discretion can be exercised rationally unless the defense is permitted to make a showing that it should be exercised on the side of production. Only thus can the defense show "a particularized need." If it succeeds, then the grand jury testimony should be produced directly to the defense. If it fails, then the trial judge should make an inspection first.

Nathan Witt, P. O. Box 156, New York 23, New York,
Attorney for Appellant.

I certify that the above is filed in good faith and not for the purpose of delay.

Nathan Witt

[fol. 1314]

IN UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

ORDER DENYING PETITION FOR REHEARING—August 21, 1959

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied, Honorable Alfred P. Murrah, Chief Judge, dissenting.

By order of September 1, 1959, the mandate of the United States Court of Appeals was stayed for a period of thirty days from that day under provision of paragraph 3 of rule 28 of said court.

[fol. 1315] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1316]

SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1959

MAURICE E. TRAVIS, Petitioner,

vs.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 8, 1959

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

October 20th, 1959.

Charles E. Whittaker, Associate Justice of the Supreme Court of the United States.

Dated this 8th
day of September, 1959.

[fol. 1317]

SUPREME COURT OF THE UNITED STATES

No. 479—October Term, 1959

MAURICE E. TRAVIS, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—May 31, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with Nos. 75 and 872 and a total of three hours is allowed for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
OCT 16, 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. ~~479~~ 10

MAURICE E. TRAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1959

No.

MAURICE E. TRAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit, Judge Murrah dissenting, which affirmed a judgment of the United States District Court for the District of Colorado, convicting petitioner, after a jury trial, on the four counts of an indictment charging violation of 18 U. S. Code, Sec. 1001, by the making and filing of two false affidavits under Section 9(h) of the Taft-Hartley Act, 29 U. S. Code, Sec. 159(h).

Opinions Below

The opinion of the court below and the dissent, App. A,[1] *infra*, p. 47, have not yet been reported.

[1] We use "App." to refer to the appendices to this petition.

Jurisdiction

The judgment of the Court of Appeals is dated and was entered on August 3, 1959 (p. 44).[2] A petition for rehearing was denied on August 21, 1959 (p. 50). On September 8, 1959, Mr. Justice Whittaker extended the time for filing a petition for writ of certiorari to and including October 20, 1959.

Jurisdiction of this Court is conferred by 28 U. S. C. 1254(1).

Questions Presented

1. Whether the trial court did not err in submitting the case to the jury because (a) the perjury rule of evidence is applicable to a prosecution for filing false affidavits under Section 9(h) of the Taft-Hartley Act and was not satisfied by the proof; (b) the evidence against petitioner consisted solely of his uncorroborated extrajudicial admissions subsequent to the alleged commission of the crimes charged; and (c) without reference to the foregoing, the evidence was palpably insufficient both as to the falsity and as to the materiality of petitioner's affidavits.

2. Whether the instructions of the trial court were not erroneous and prejudicial because (a) Section 5 of the Communist Control Act of 1954, 50 U. S. C. 844, setting forth thirteen indicia of membership in the Communist Party is unconstitutional on its face and as applied in the instructions; (b) the court erred in other respects in instructing on the meaning of the terms "membership" and "affiliation"; (c) the court refused to instruct on the ap-

[2] References in this form are to the typewritten transcript of the proceedings in the court below. We use "R." to designate the printed record on the appeal to the court below.

plicability of the perjury rule of evidence; and (d) the court refused to instruct that petitioner could not be convicted unless the jury found that he believed himself to be a member of or affiliated with the Communist Party at the times he executed the affidavits.

3. Whether the trial court did not err in denying petitioner's motions for the production, to the defense or to the court for its inspection, of grand jury testimony about petitioner by witnesses for the prosecution who testified at the trial.

4. Whether the trial court did not err in applying 18 U. S. C. 3500(a) by ruling that the prosecution, not the court, determines what documents are "statements" and thus subject to production; (b) by refusing to order the prosecution to produce statements made by one of the witnesses to a Senate investigator and by all three witnesses to government attorneys; and (c) whether, as thus applied, Section 3500 violates the *ex post facto* and due process clauses.

5. Whether rulings of the trial court on the admission and exclusion of evidence were not erroneous and prejudicial.

6. Whether venue did not lie solely in the District Court for the District of Columbia where Section 9(h) of the Taft-Hartley Act required the affidavits to be filed and not in the District Court for the District of Colorado where the affidavits were made and mailed.

Statutes Involved

18 U. S. C. 1001; 29 U. S. C. 159(h) (Section 9(h) of the Taft-Hartley Act);[3] Section 5 of the Communist Control Act of 1954, 50 U. S. C. 844; 18 U. S. C. 3500; and 18 U. S. C. 3237 are set forth in Appendix C.

Statement of the Case

The indictment and first trial.

Petitioner, then secretary-treasurer of the International Union of Mine, Mill and Smelter Workers (hereinafter called Mine, Mill), filed non-Communist affidavits in December, 1951 and December, 1952, with the National Labor Relations Board in Washington, D. C. The affidavits were executed by petitioner in Denver, Colorado, and were mailed from there to the Board in Washington, D. C. (R. 42-50; Govt. Exs. 1-6, R. 1242-47).

Petitioner was indicted on six counts, alleging that each of the two affidavits was false with respect to membership in, affiliation with, and support of, the Communist Party. The support counts were dismissed on motion of the government before petitioner's first trial (R. 19), when he was convicted on the four remaining counts. The conviction was reversed by the Court of Appeals because of improper cross-examination of petitioner's character witnesses. *Travers* v. *United States*, 247 F. 2d 130, App. B, *infra*, p. 78. The court held, however, that venue in Colorado was proper and gave directions to the trial court concern-

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[3] Repealed by Sec. 201(d) of the Labor-Management Reporting and Disclosure Act of 1959 (P. L. 86-257). However, the new statute provides that no person who is or has been a member of the Communist Party (or who has been convicted of certain felonies) may hold office in a union or be employed in certain capacities during or for five years after the termination of his membership in the Communist Party (or after such conviction or imprisonment therefor). Sec. 504(a).

ing instructions as to the meaning of membership and affiliation on any new trial. These matters are among those presented on this petition, *infra*, pp. 20, 40.

The evidence as to membership and affiliation.

It is undisputed that petitioner was a member of the Communist Party prior to 1949. The prosecution introduced a statement written by him and published in the Mine, Mill newspaper on August of that year announcing that he had resigned from the Party "in order to make it possible for me to sign the Taft-Hartley affidavit" (Govt. Ex. 8, R. 1249). The statement expressed petitioner's reluctance to take this step and his indignation at the provision of the law which made it necessary.

The theory of the prosecution was that petitioner's resignation was a pretense and that his membership continued beyond the date of the 1949 affidavit. However, there was no evidence that subsequent to the 1949 resignation, petitioner paid dues or made financial contributions to the Communist Party, attended Party meetings, carried out Party instructions, or considered himself bound by Party discipline.

The case for the prosecution rested entirely on the testimony of three witnesses: Eckert, Mason and Gardner.

Eckert's testimony related to the period from 1942 to 1948 when he had known petitioner as a fellow-Communist in Mine, Mill. Except for two matters, it established nothing of significance that petitioner did not concede and offer to stipulate—*i.e.*, that he had been a Party member prior to his 1949 resignation (R. 56-63). The first exception consisted of Eckert's assertion that the "policy of the Party was that once having joined the Communist Party you could not leave without being expelled" (R. 196).[4] The second was his testimony that in 1948, at a Communist

[4] The error in admitting this testimony is discussed *infra*, p. 33.

meeting where the policy of non-compliance with Section 9(h) was supported, petitioner asked Green, a fellow-Communist, whether Lenin's teaching that Communists in trade unions should use "artifice or device" to retain their posts was applicable to the present situation (R. 132). Green replied in the affirmative, adding that labor leaders could circumvent the law by joining "a Thursday afternoon social club" (R. 133).

So far as material, the testimony of Gardner and Mason related to statements which petitioner made in conversations with them individually, two with Gardner and six with Mason. As the prosecution conceded and the court below acknowledged, none of these conversations yielded direct evidence of membership or affiliation. The court below held, however, that they contained admissions by petitioner sufficient to support an inference that he was a member of and affiliated with the Communist Party when he signed the affidavits in 1951 and 1952. Three of the conversations occurred prior to the filing of the 1951 affidavit and the others thereafter. In what follows, we summarize the eight conversations in chronological order.

1. Mason[5] testified that in June, 1949, petitioner told him that the Executive Board of Mine, Mill would soon be acting on its policy of non-compliance with the filing requirements of Taft-Hartley because the union had been losing ground by not appearing on ballots in Labor Board elections and that there had been "discussions going on within the Party on this whole deal'" (R. 611).

2. Mason also testified to a conversation with petitioner in July, 1949, at the time when Mine, Mill decided to comply with the Taft-Hartley filing requirements. On that occasion, Travis said that he would have to resign from the Party. He gave Mason a copy of the statement announcing

[5] Mason was a member of the Executive Board of Mine, Mill during the period covered by his testimony (R. 602).

his resignation which, he said, "had been cleared with Ben Gold and the Party people in New York". He further told Mason that "the Party thinks this is the best policy for us in the unions to follow" (R. 612-13).

3. Gardner testified that he had a talk with petitioner in September or October, 1951 (several months prior to the date of petitioner's 1951 affidavit) when the two met for the first time.[6] Travis expressed gratification at the fact that the Cleveland Communist Party had recommended Gardner highly to Mine, Mill (R. 589). Travis also said that his public resignation from the Party had been a mistake because "it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely to conform to Taft-Hartley affidavits" (R. 590).

4. Mason testified that in March, 1952, petitioner told him that the Soviet delegates to the World Federation of Trade Unions were demanding that the "left-wing unions" in this country form a third federation of labor and that after discussion, "the boys in the other unions" had asked him, petitioner, to inform the WFTU that they were opposed to such a move. Petitioner added that the Party had left a decision in the matter "up to us and the unions" (R. 616).

5. Mason testified that in March, 1953, petitioner remarked to him that issues like the repeal of the McCarran Act were important because, "When they get us Communists they will be after people like you if we don't get these laws repealed" (R. 620).

6. Gardner testified that in June, 1953, while he was on his way to a new assignment in Idaho, Travis told him

[6] Gardner had just been employed by Mine, Mill as an international representative (R. 583).

in Denver that because of a factional dispute within the Communist Party in Idaho, in which Mine, Mill people were involved, Gardner should abstain from Communist Party activity for the time being. Travis added that he would arrange to have Gardner contacted by a Communist Party representative when the factional dispute was resolved, at which time Gardner could resume his Party activities (R. 593-94).

7. Mason testified that, in a series of conversations in July and August, 1953 (R. 623-33)[7] he complained to petitioner of the activities of "the Party watchdogs" in the union (R. 623), the policies of the union newspaper, and activities of the Party people in the union generally. Petitioner's attitude was that these complaints were "in direct opposition to the Party" and that the policies would not be changed (R. 632). When Mason threatened to conduct a fight against Communist control of the union, Travis replied that the left-wing group in the leadership was opposed to any compromises and added that he was "one of those in the Party who thinks there have been too many compromises already * * * that the Soviet Union is becoming stronger, and that the position of the Communists in the Union has been stronger" (R. 632). Travis concluded the conversation by saying, "You and Joe [Mason's brother] were invited to get into the Party, and had you done so, you would be sitting high in the councils of this organization with us, but you failed to do so" (R. 633).

As we later show, *infra*, p. 11, the conviction cannot be supported on this evidence because (a) it does not satisfy the perjury rule which is applicable to this prosecution; (b) it consists entirely of uncorroborated admissions subsequent to the alleged commission of the crime charged;

[7] Initiated by a telephone call from Mason in Butte to Travis in Denver, which was followed by a meeting of the two men in Butte and then one in Denver. Since all three discussions dealt with the same subject, we treat them together.

and (c) it is insufficient even if the perjury rule and the rule barring conviction on uncorroborated admissions are inapplicable.[8]

The lack of evidence as to materiality.

There was no evidence that Mine, Mill filed any charge with the National Labor Relations Board, petitioned it to conduct any election, or otherwise participated in the Board's proceedings in any way not open to it if it had not complied, during the two annual periods following the filing of petitioner's 1951 and 1952 affidavits. Hence, there was a failure of proof that the alleged false statements were material, *infra*, p. 18.

The application of 18 U. S. C. 3500 and the refusal of the trial court to order the production of grand jury testimony of the prosecution witnesses.

On the trial, issues also arose under Section 3500. These are discussed *infra*, p. 30.

The trial judge refused, on motions of the defense, to direct that grand jury testimony of the prosecution witnesses about petitioner be produced for the defense or, in the alternative, for his inspection. The issues which are presented in this connection are discussed *infra*, p. 26.

The instructions.

The trial court instructed the jury that membership in the Communist Party " * * * connotes a status or mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member" (R. 1228).

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[8] Errors of the trial court in admitting Eckert's testimony of the "can't resign" policy of the Communist Party and in restricting the cross-examination of all three witnesses are discussed *infra*, p. 33.

Whatever guidance this definition, standing alone, might have given the jury was vitiated by the instructions that followed. In these, the jury was first told that "individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party * * * are circumstances which you may take into consideration along with all the other evidence in this case" in determining the issue of membership (R. 1228). The court then charged that in passing on this issue, the jury might consider eleven of the thirteen indicia of membership in the Communist Party set forth in the Communist Control Act of 1954, 50 U. S. C. 844.[9] These include consideration of such matters as whether the defendant had (a) "communicated * * * plans of the Communist Party," (b) "imparted information, suggestions, recommendations" to anyone "in behalf of the organization" or (c) "indicated * * * a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes of the organization" (R. 1229).

These instructions, in their totality, laid down hopelessly vague and irrational standards of proof and obliterated any distinction between "membership" and "affiliation" which, as the the trial court charged, "means a relationship short of and less than membership." (R. 1230).

Furthermore, the court refused to charge on the applicability of the perjury rule of evidence and to charge that the jury could not return a verdict of guilty unless it found that at the times the affidavits were filed the defendant believed himself to be a member of or affiliated with the Communist Party, *infra*, pp 11, 23, 25.

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[9] The two omitted indicia were whether the defendant (1) "has been listed to his knowledge as a member in any * * * document of the organization," and (2) "has made financial contributions to the organization in dues, assessments, loans, or in any other form."

The conviction and sentence.

Petitioner was convicted on all four counts of the indictment and was sentenced to a four year prison term on each count, the terms on the two membership counts to run consecutively, and the terms on the two affiliation counts to run consecutively with each other but concurrently with the terms on the membership counts. Petitioner was also fined $2,000 on each of the two membership counts.

The opinions below.

A majority of the court below rejected all of petitioner's contentions and affirmed the conviction. Judge Murrah, dissenting, App. A, *infra*, p. 76, held that the perjury rule was applicable and not satisfied by the evidence which, in any event, he found to be "inconclusive". He further held that a reversal was required "for the refusal of the trial judge to examine the grand jury evidence *in camera*, to determine whether the lid of secrecy ought to be lifted in the interest of the proper administration of criminal justice".

REASONS FOR GRANTING THE WRIT

I. Questions relating to the sufficiency of the evidence.

A. The perjury rule of evidence was applicable and was not satisfied by the proof.

This Court has never decided whether the perjury rule of evidence is applicable to proof of the crime of false swearing when prosecuted under Section 1001 rather than under the perjury statute, 18 U. S. C. 1621.[10]

[10] The question was before the Court in *Gold* v. *United States*, 352 U. S. 985, but was left undecided because of the reversal on another ground. Mr. Justice Clark, dissenting, protested against the Court's failure to decide this question, among others, at 986.

The perjury rule requires the direct evidence of at least two witnesses or "one witness corroborated by circumstances, proved by independent testimony". *United States* v. *Wood*, 14 Pet. 430, 440. This Court has consistently adhered to this rule. *Hammer* v. *United States*, 271 U. S. 620, 626; *Weiler* v. *United States*, 323 U. S. 606.

In support of his motion for judgment of acquittal, petitioner argued that the perjury rule was applicable, but the trial court ruled to the contrary (R. 1093-94, 1114).[11] The court below, with Judge Murrah dissenting, adhered to its decision in *Sells* v. *United States*, 262 F. 2d 815, cert. denied, 360 U. S. 913, that the perjury rule is inapplicable to a prosecution like this.

If the perjury rule is applicable, a reversal is required since, as the court below acknowledged, "The government's case is concededly circumstantial" App. A, *infra*, p. 55.[12]

False swearing under Section 1001 is in every respect but name the same as perjury under Section 1621. Hence, there is no reason why the rule for proving the latter should not be applicable to the former. Indeed, the filing of a false affidavit under Section 9(h) would have been punishable as perjury if the Section had not expressly stated that the crime should be prosecuted under Section 1001. And as Judge Murrah points out, "there is nothing in the legislative history of Section 9(h) to indicate that the Congress entertained the view that the perjury rule was inapplicable to prosecutions under Section 1001, as in Section 1621". App. A, *infra*, p. 76. That even judges equate a prosecution under Section 1001 for false swearing with perjury is shown by the opinions of Justices Frankfurter

[11] The issue was also raised in connection with the instructions to the jury, *infra*, p. 25.

[12] Judge Murrah's dissent characterizes the evidence as "indirect and circumstantial" and also "inconclusive". App. A, *infra*, p. 76.

and Jackson in *American Communications Association* v. *Douds*, where they referred to falsification of the non-Communist affidavit as "perjury". 339 U. S. 382, 420, 436.

In the *Sells* case, the court below had expressed the view that to apply the perjury rule would "merely thwart the attainment of the end which Congress sought to accomplish by the enactment of Paragraph 9(h)". 262 F. 2d 815, 822. This is not an argument for the inapplicability of the perjury rule to Section 1001 cases, but for its abolition altogether. This Court, however, rejected the same argument—i.e., that the perjury rule raises "an unjustifiable barrier to convictions"—when advanced by the government in a perjury case. *Weiler* v. *United States*, *supra*, at 608-09.

Furthermore, insofar as the opinion in the *Sells* case says that direct proof of Party membership "is requirement of the impossible", 262 F. 2d 815, 822, it contradicts what this Court said in *Douds* about the necessity of direct proof where the charge is that membership has been falsely denied in the 9(h) affidavit. 339 U. S. 382, 410-11. That, in this respect, *Douds* enunciated principles applicable to perjury prosecutions for denial of Communist Party membership was expressly recognized in such a case by the Court of Appeals for the Second Circuit. *United States* v. *Remington*, 191 F. 2d 246, 249.

The perjury rule has been applied in cases other than perjury where false swearing is the gravamen of the offense. Thus, *Hammer* v. *United States*, 271 U. S. 620, 629, holds the rule applicable to subornation of perjury, as well as to perjury, because "Falsity is as essential in one as in the other". Since falsity is likewise essential in this case, the perjury rule should be applicable here as well.

The decision below is in accord with *United States* v. *Killian*, 246 F. 2d 77 (C. A. 7), rev'd on rehearing, on other grounds, 246 F. 2d 82, and *Fisher* v. *United States*,

231 F. 2d 99 (C. A. 9), rev'd on other grounds.[13] But Judge Murrah in this case and Judge Bazelon in the *Gold* case, 237 F. 2d 764, 765-67, have expressed a contrary view, and in the *Fisher* case, the Court acknowledged that the question is "a close one", at 106. The question is important, relating as it does not only to cases of false 9(h) affidavits, but to all cases under Section 1001 involving false swearing. This Court should settle it.

B. The rule against convicting on the basis of uncorroborated admissions was violated.

A conviction may not be based on uncorroborated extrajudicial admissions of the accused made after the alleged commission of the offense. For such admissions, like confessions, are too untrustworthy by themselves to warrant a finding of guilt. *Opper* v. *United States,* 348 U. S. 84. Cf. *Warzower* v. *United States,* 312 U. S. 342, 347-48. The *Opper* case involved statements of the accused to the FBI, but the decision was not limited to admissions made to governmental authorities. The Court stated, at 89-90, that "the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under suspicion may tinge or warp the facts of the confession" just as much as "the zeal of the agencies of prosecution".

The conviction of petitioner violates the rule enunciated in *Opper.* As we have seen, *supra,* pp. 7-8, Gardner and Mason testified to five conversations which one or the other of them had with petitioner after the execution of the 1951 affidavit. We later show that petitioner's statements in these conversations were entirely consistent with innocence.

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[13] In *Gold* v. *United States,* 237 F. 2d 764, rev'd on other grounds, 352 U. S. 985, where this was an issue, the conviction was affirmed by an equally divided *en banc* court. Judge Bazelon was the only judge who filed a statement of his reasons.

But even if they had contained admissions that he was a member of or affiliated with the Communist Party when the affidavits were executed, the admissions would be insufficient unless corroborated.

There was no corroboration. First, there was no evidence whatsoever of any other occurrences subsequent to the filing of the 1951 affidavit which could give rise to an inference of membership or affiliation on or after that time. Second, there was nothing in the evidence of events prior to the execution of the 1951 affidavit which corroborates the post-affidavit admissions. The June, 1949, conversation between Mason and petitioner, *supra*, p. 6, shows only that petitioner said that discussions about compliance were going on within the Party. Petitioner's July, 1949, statement to Mason, *supra*, pp. 6-7, that the announcement of his resignation had been approved by the Party as "the best policy for us in the unions to follow" is obviously no evidence that his resignation was spurious. And his comment to Gardner in the fall of 1951, *supra*, p. 7, that he believed *public* resignation a mistake because it gave "the enemies of the Party" an opportunity to charge that "his wasn't a true resignation" is not an admission of continuing membership but a statement of what his opponents were asserting.

Eckert's testimony that it was Party policy not to recognize resignations, *supra*, p. 5, if admissible, does not aid the prosecution. There is no evidence that petitioner had knowledge of this supposed policy and, as the court below acknowledged, App. A, *infra*, p. 58; "without more, it could show nothing of the state of mind of the defendant and could not show that he did not, in fact, resign from the Party on the date he claimed". Plainly, therefore, this testimony does not corroborate the post-affidavit admissions which relate to petitioner's "state of mind", *i.e.*, his alleged lack of good faith in resigning from the Party.

Likewise unavailing is Eckert's story that in 1948 petitioner asked Green about the applicability of Lenin's dictum that Communists in trade unions should resort to "artifice" to retain their posts, *supra*, pp. 5-6. In the first place, the question was purely hypothetical since Communist Party policy and petitioner's own position at the time was one of non-compliance with Section 9(h). Moreover, there is no evidence that petitioner acquiesced in Green's affirmative answer to his question. At most, this conversation indicates that in 1948 petitioner had an inconclusive discussion of the possible use of "artifice" as an abstract tactical question. The fact that he did so does nothing to corroborate claimed admissions of Party membership made four years later.

Since petitioner's post-affidavit admissions were uncorroborated and there was no other post-affidavit evidence on which a finding of guilt could be made, the trial court erred in submitting the case to the jury. The admissions were not even direct, but circumstantial.

In sustaining the conviction without reference to the rule of the *Opper* case, the court below decided an important question of criminal evidence contrary to the decisions of this Court.

C. The evidence was insufficient without reference to the perjury rule or the rule against convicting on uncorroborated admissions.

In the preceding point we examined all of the evidence relating to the period prior to the execution of the 1951 affidavit and showed that it contains nothing from which guilt can be inferred. It remains to consider petitioner's five post-affidavit conversations with Gardner and Mason, on the assumption that neither the perjury rule nor the rule against convicting on uncorroborated admissions is applicable to proof of petitioner's guilt.

Our summary of the five conversations, *supra*, pp. 7-8, confirms Judge Murrah's observation that the evidence against petitioner was "inconclusive". App. A, *infra*, p. 76. The only admissions which are damaging in any sense were made in petitioner's March and August, 1953 talks with Mason. In March, petitioner warned Mason that unless the McCarran Act [14] and similar legislation was repealed, "When they get us Communists they will be after people like you". In August, petitioner told Mason that his group in Mine, Mill was opposed to any compromise with Mason's faction and added that he was "one of those in the Party who thinks there have been too many compromises already". Both statements are equivocal at best. Petitioner's reference to himself as a "Communist" in the March statement may well have meant no more than that, as an acknowledged former member of the Party and a trade union leader who had not renounced his radical views, he would be among the first targets of current anti-Communist legislation. And the August statement is oper to interpretation as an admission merely of membership in the so-called "Party" faction in Mine, Mill rather than in the Communist Party itself. Obviously, a conviction cannot rest on two such slender reeds.

Petitioner's other statements in the post-affidavit conversations show that at most he was a member of the Mine, Mill leadership which may have been in sympathy with Communist trade union policy,[15] and that he had respect for the Communist Party, and was in occasional contact with it.

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[14] Apparently a reference to the Internal Security Act of 1950, 50 U. S. C. 781.

[15] However, the grouping did not always support Communist policy. Thus, it appears from one of these conversations that petitioner and other trade unionists rejected a demand by the Soviet delegation to the Word Federation of Trade Unions that the "left wing" unions in this country organize a third labor federation, *supra*, p. 7.

This is not proof of membership. It is entirely lacking in the element of mutuality which lies at the heart of the membership relation and which the trial court defined as "the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him a member" (R. 1228).[16] And cf. *Bridges* v. *United States*, 199 F. 2d 811 (C. A. 9), rev'd on other grounds, 346 U. S. 209, holding that attendance at numerous Communist Party meetings, including "closed" meetings, acceptance of the Party's aid and assistance, sympathy with Party objectives, and the expression of opinions on national and world affairs that coincide with the Party's position are insufficient to prove membership.

The post-affidavit evidence is equally deficient as proof of affiliation. For there was no showing of a course of conduct by petitioner which, in the words of the trial court's instructions (R. 1230), established "a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite period upon a fairly permanent basis."[17]

The nature of the evidence required to prove membership in or affiliation with the Communist Party has not been decided by this Court. The question is one of importance in criminal prosecutions and other proceedings where such membership or affiliation is in issue.

D. The evidence of materiality was insufficient.

Each of the counts in the indictment alleges that the false statements were material and the trial court cor-

[16] Taken from Mr. Justice Burton's concurring opinion in *Jencks* v. *United States*, 353 U. S. 657, 679.

[17] Also from Mr. Justice Burton's concurrence in *Jencks*, *supra*, at 679-80.

rectly charged the jury that materiality was one of the essential elements of the offense (R. 1225). But there was in fact no evidence of materiality.

On the trial, the parties stipulated that the affidavits and the other documents required by Sections 9 (f), (g), and (h) of Taft-Hartley had been filed with the Labor Board in 1951 and 1952 and that, on both occasions, the Board had notified Mine, Mill that it was in compliance with the filing requirements (R. 42-50). However, there was no evidence in the case that Mine, Mill had actually utilized the processes of the Board in ways that would not have been available to it if it had not complied.[18] In denying the motion for a judgment of acquittal, the trial court ruled that such evidence was not necessary (R. 1107).

The trial court was in error. The purpose in filing the affidavits (and the other necessary documents under Sections 9 (f) and (g)) with the Labor Board is not to be notified by the Board that there is "compliance", but to use the machinery of the Board. Section 9 (h) does not refer to "compliance", but to the actual use of the Labor Board's procedures.[19] Without evidence of any such use, the false statements in this case had no materiality.

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[18] That is, by filing charges, appearing on the ballot in representation elections, etc.

[19] In *Jencks*, 353 U. S. 657, and in *Gold*, 352 U. S. 985, the prosecution recognized this by presenting evidence that the respective labor organizations had in fact so used the Board (R. 1095).

II. Questions relating to the instructions.

A. The instructions on "membership" and "affiliation" were erroneous.

The trial court first charged that membership in the Communist Party, "the same as membership in any other organization" requires the presence of "the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member" (R. 1228). While the court then charged that the question of petitioner's membership was to be decided from all the evidence in the case, the only specific evidentiary standards to which it directed the attention of the jury were all of the 13 indicia of membership set forth in Section 5 of the Communist Control Act of 1954, 50 U. S. C. 844.

The Court has not had previous occasion to consider Section 5 which, on its face and as applied below, raises questions of far-reaching importance under the First and Fifth Amendments.[20]

Section 5 provides that "in determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented" as to the 13 indicia which the Section then enumerates. This introductory provision, alone, demonstrates the invalidity of the Section.

First, the rule of evidence which the Section enunciates is made applicable only to proof of membership in the Communist Party and organizations that seek the violent overthrow of the Government. There is no rational basis

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[20] The grant of certiorari in *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115 included review of the constitutionality of the Section, but the Court did not reach the question.

for this classification. Moreover, the classification contradicts the trial court's instruction that membership in the Communist Party is the same as membership in any other organization.

Second, the quoted provision makes evidence as to one or more of the 13 indicia that follow admissible to prove, indiscriminately, (1) membership, (2) participation, and (3) knowledge of the organization's purpose. But participation may exist without membership; knowledge of purpose may exist without membership or participation, and membership or participation may exist without knowledge of purpose. It is apparent that a system of proof which equates these three distinct concepts must either be irrational, hopelessly vague, or both.

Turning to the indicia themselves, it appears, in the first place, that none of them is limited as to time. Thus, any activity of the sort which they describe may serve as evidence of present membership notwithstanding that it ceased in the remote past. Such a rule of evidence is patently irrational. Its irrationality was carried over into the instructions. For they left the jury free to consider conduct by petitioner of the kind described in the indicia during his conceded membership in the Communist Party (as early as 1942) as evidence of membership in 1951 and 1952, the times charged in the indictment.

The first two indicia of Section 5 bear an obvious relation to proof of membership: (1) the listing of the accused, to his knowledge, as a member in the records of the organization; and (2) payment by the accused of dues or assessments. But these were the only ones of the 13 indicia not included in the charge, obviously because there was no evidence of either. In consequence, petitioner was deprived of the benefit of a negative finding on these indicia, even though the introductory clause to the Section requires that all the indicia be given to the jury.

The remaining 11 indicia have no rational relation to proof of membership either as the term is commonly under-

stood or as the charge defined it. This is apparent from inspection. We confine ourselves to four examples.

Paragraph (6) permits membership to be inferred from the fact that the accused has conferred with officers or members "in behalf of any plan or enterprise of the organization." Thus, any person who consults or advises with a member or officer of the Communist Party with respect to any of its "plans", however praiseworthy, thereby furnishes evidence of his membership in the organization.

Other paragraphs go even further by eliminating contact or communication between the accused and the organization as a requisite to evidence of membership. Thus, paragraphs (11), (12) and (13) provide that a jury may infer membership from the fact that the accused has imparted information, suggestions or recommendations to anyone "in behalf of the objectives of the organization", has indicated in any way "a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization", or "has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization." Under these paragraphs, an accused who has expressed a view or taken a position on any public question which corresponds to that of the Communist Party thereby furnishes evidence of party membership.

Considered individually or collectively, the 11 Section 5 indicia of membership contained in the instructions permit a finding that almost anyone is a member of the Communist Party. Moreover, no one can possibly know, in advance of the jury's verdict, whether or not his activities make him a member.[21] The lack of any rational relation

[21] The vices inherent in Section 5 were compounded by the further instruction that, while not conclusive, the jury could consider "individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party" in determining the question of membership (R. 1228).

between these evidentiary criteria and the fact to be proved, and their extravagant vagueness—particularly since they involve rights of speech and assembly—condemn them as violative of due process. *Tot* v. *United States*, 319 U. S. 463, 467; *Bailey* v. *Alabama*, 219 U. S. 219, 235; *Manley* v. *Georgia*, 279 U. S. 1; *Burstyn* v. *Wilson*, 343 U. S. 495; *Winters* v. *New York*, 333 U. S. 507; *Niemotko* v. *Maryland*, 340 U. S. 268; *Lanzetta* v. *New Jersey*, 306 U. S. 451. Furthermore, because Section 5 leaves the jury free to find membership from evidence that the accused engaged in constitutionally protected speech, it also violates the First Amendment. *Winters* v. *New York*, *supra*.

The court below, in an apparent reference to the trial judge's initial definition of "membership", stated, App. A, *infra*, p. 69:

> "* * * it must be presumed that the jury, after such careful instructions on the components of membership, is perfectly capable of separating evidence which tends to prove membership from evidence which does not."

This presumption might have been legitimate if the Section 5 indicia had been omitted from the charge. Their inclusion, however, raises the contrary presumption since the jury was thereby specifically instructed to consider evidence which had no conceivable tendency to prove membership as defined by the trial court.

The resulting prejudice to petitioner was accentuated by the refusal to charge that he could not be convicted unless the jury found that he believed himself to be a member when he executed the affidavits (Supp. R. 8). Thus, the jury, having found petitioner to be a member on the basis of the vague and irrational indicia of Section 5, was left free to convict without making the further finding that petitioner considered himself a member or, at least,

the jury could not reasonably have done otherwise.[22] Cf. *American Communications Association* v. *Douds*, 339 U. S. 382 at 413; *Screws* v. *United States*, 325 U. S. 91. The refusal of this instruction was peculiarly harmful because the Communist Control Act was not enacted until 1954. Hence, petitioner could not have known when he executed the affidavits in 1951 and 1952 that their truth or falsity would be judged by the evidentiary standards of Section 5. For this reason also, Section 5, even if valid on its face, violates the *ex post facto* clause of the Constitution as applied to petitioner.

The conviction cannot be sustained on the theory that because petitioner's sentences on the membership and affiliation counts run concurrently, any error in the instructions on membership were harmless. For the vice of the latter infected the instructions on affiliation.

The trial court charged that "affiliation" means "a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party." (R. 1230). As we have seen, however, the court's instructions under Section 5 of the Communist Control Act permitted the jury to base a finding of membership on evidence of activities of petitioner that established no more than his sympathy with the legitimate aims and objectives of the Party. The jury must, therefore, have believed that it was entitled to find affiliation, a "relationship short of and less than membership," from the same evidence.

Accordingly, the instructions on membership vitiated the court's definition of affiliation as "a close working alliance or association between [petitioner] and the organi-

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[22] The generalized instruction earlier in the charge (R. 1228) that petitioner could not be found guilty unless he knew that the affidavits were false is obviously no substitute for the instruction that was requested.

zation, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite period on a fairly permanent basis." (R. 1230). For, once the jury found that petitioner was a member of the Communist Party under the Section 5 indicia, it could and undoubtedly did proceed to find him an affiliate on the basis of the elementary proposition of logic that the greater includes the lesser.

Hence, the inclusion of the Section 5 indicia in the instructions on membership permitted the jury to find affiliation as well as membership from evidence that was not probative of either relationship. Moreover, the instructions on affiliation, like those on membership, were prejudicial because of the refusal to charge that petitioner could not be convicted unless he believed himself to be an affiliate at the time he executed the affidavits (Supp. R. 5).

The questions presented by Section 5 of the Communist Control Act and the instructions on membership and affiliation are novel and important, and were decided below contrary to the applicable decisions of this Court. They should therefore be reviewed.

B. The refusal to instruct on the perjury rule was erroneous.

We have urged, *supra*, p. 11, that the trial court should have granted the motion for an acquittal because the proof failed to satisfy the perjury rule of evidence. If the rule is applicable, the court should, at least, have given the requested instruction (Supp. R. 5-6) on the subject.

III. Questions relating to the production of Grand Jury testimony of the prosecution witnesses for the purpose of impeachment.

In three respects, the decision below violates the principles enunciated by the Court in *Pittsburgh Plate Glass Co.* v. *United States* and *Galax Mirror Company* v. *United States,* 360 U. S. 395. In addition, the case presents the question that the Court expressly reserved, at 401, *i.e.*, whether the trial judge, upon request, is "absolutely required" to examine the grand jury testimony of a prosecution witness for inconsistencies with his trial testimony.

Eckert and Mason, two of the three government witnesses, had testified in 1954 before the grand jury which indicted petitioner in this case and again in 1956 before a grand jury in the same district which indicted petitioner and 13 others for conspiracy to file false affidavits under Section 9 (h). *United States* v. *Pezzati et al.*, awaiting trial (Crim. No. 15124). Gardner, the third government witness, had testified before the grand jury in the *Pezzati* case.

On the trial, after each of the three witnesses had completed his direct testimony, the defense moved that his testimony about petitioner before the grand juries be produced directly to the defense, or, in the alternative, to the trial judge for his inspection and then to the defense if the inspection disclosed any contradictions or inconsistencies with the trial testimony. The motions were denied when made and again when renewed after the cross-examination of each witness had otherwise been completed: (*Eckert*: R. 197, 212-20, 551-73. *Gardner*: R. 598-99, 699-701, 864-67. *Mason*: R. 635, 988-90.) When the defense asked the witnesses whether they had testified before the grand juries about the episodes to which they had testified on direct examination and even whether they had testified about petitioner before the grand juries at all, the trial

judge sustained the objections of the government (R. 540, 698-701, 704, 873-74). Yet, he also ruled that unless the defense first showed a contradiction between the trial testimony and the grand jury testimony, the grand jury testimony need not be produced (R. 219, 573, 867).

1. The *Pittsburgh Plate Glass* case, at 400, requires that the trial judge exercise his discretion to determine whether the accused has shown "a particularized need" which justifies production of the grand jury testimony directly to the defense. The trial judge failed to exercise this discretion. Instead, he required the defense to show a contradiction between the grand jury and the trial testimony. But *Pittsburgh Plate Glass*, 400-01, declares that such a showing is unnecessary. Moreover, the trial judge made the showing impossible by barring interrogation of the witnesses about the substance of their grand jury testimony.

2. The defense *did* demonstrate "a particularized need". (*Eckert*: R. 551-73; *Gardner*: R. 864-67; *Mason*: R. 988-90.) All three of the witnesses were ex-Communists and Mason had been an informant for the FBI at the time that he was a member of the Executive Board of Mine, Mill. Eckert and Gardner had been associated with Mine, Mill, and were officials of rival labor organizations at the time they testified. The testimony of all three witnesses betrayed their hostility towards petitioner and towards Mine, Mill and there are inconsistencies in the testimony of each. This was the eighth time since 1950 that Eckert had testified publicly against Mine, Mill and petitioner (R. 248-51), but his testimony, for example, as to who in addition to himself and petitioner had attended particular meetings, had not been consistent in any two of the proceedings (R. 399-448, 536-51). Mason had admittedly been mistaken in his testimony on a prior occasion about the city where he had had his July, 1949 conversation with petitioner (R. 894-95, 988-

89)[23] and, on direct examination, gave detailed testimony about his conversations with petitioner during the period from 1949 to 1953 despite an admission to the FBI in June, 1955 that he was "unable to enlarge" on information about petitioner "as to dates, places or specific individuals or incidents" (R. 989).

Although Gardner had given the FBI information from time to time since 1955, statements of his produced under Section 3500 contained no reference whatever to the two conversations with petitioner which comprised all of his material testimony and, on cross-examination, he conceded that he had never told the FBI about the two episodes (R. 864-66). His testimony cast serious doubt on his credibility generally (see, e.g., R. 656, 662-64, 667-68, 714-30). Even though the defense restricted its request to Gardner's grand jury testimony, if any,[24] about the two conversations, the request was denied (R. 864-67).

In Gardner's case particularly, it is difficult to see what more the defense could have done to show "a particularized need", especially since the trial court would not permit him to be cross-examined about his grand jury testimony.

3. Even if the foundation was insufficient to justify direct production of the grand jury testimony to the defense, and assuming that the trial judge is not "absolutely required" to inspect the minutes, the foundation in the case of each witness was certainly strong enough to require the trial judge to make the inspection himself to determine whether the "ends of justice" required disclosure. *Pittsburgh Plate Glass*, 360 U. S. at 400. Judge Murrah's dissent so holds. App. A, *infra*, pp. 76-77.

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[23] *Supra*, pp. 6-7.

[24] Cf. *Jencks*, 353 U. S. 657, 667, on the relevance "to the cross-examining process" of showing that the witness did not tell his story on a prior occasion when it would have been natural for him to do so.

4. We turn now to the question which was reserved in the *Pittsburgh Plate Glass* case, that is, whether the trial court is, in any event, "absolutely required" to inspect the grand jury testimony for inconsistencies. We believe that the affirmative answer given by the Court of Appeals for the Second Circuit is correct. *United States* v. *Spangelet*, 258 F. 2d 338.

The basis for the refusal of this Court in *Pittsburgh Plate Glass* to approve automatic delivery of grand jury minutes to the defense is the policy of secrecy. But secrecy is academic when there is preliminary inspection by the trial court. After such inspection, the defense gets only what it is entitled to, if anything—such of the witness' grand jury testimony as the trial judge finds is inconsistent with his trial testimony. All the considerations advanced in the dissenting opinion in the *Pittsburgh Plate Glass* case (except, of course, those bearing on the desirability of direct production as against inspection by the trial court) apply with even greater force to this branch of the problem. Since the government is free to use grand jury minutes "to further its own interests in litigation", 360 U. S. at 404, fairness entitles the accused, at a minimum, to have the trial court inspect them in all cases.[25]

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[25] In fact, in the *Spangelet* case, 258 F. 2d 338, where the appellant argued that the trial judge should have ordered direct production of the minutes instead of inspecting them himself, the government argued in its brief (p. 20) that the trial judge "wisely concluded" that his resolution of the problem struck a balance between the policy of secrecy, on the one hand, and the rights of the accused, on the other. From the dissenting opinion in *Pittsburgh Plate Glass*, it appears that in that case, the government took the same attitude as in the *Spangelet* case. 360 U. S. 395, 408-09.

However, a reference in *United States* v. *Stromberg*, 268 F. 2d 256, a recent decision of the Court of Appeals for the Second Circuit, seems to indicate that in some, if not in all criminal cases in the Southern District, the prosecution now makes the grand jury testimony of its witnesses automatically available to the defense. In connection with its discussion of the testimony of Ewing, a government witness, the Court noted that after his direct examination, the prosecution delivered to the defense Ewing's grand jury testimony as well as his statements under Section 3500. 268 F. 2d 256, 273, n. 16.

This Court should now settle this question, as well as the others this case raises in connection with the production, on trial, of grand jury testimony.

IV. Questions relating to the application of Section 3500.

A. In *Palermo*, 360 U. S. 343, the Court said, at 354:

> "The statute itself provides no procedure for making a determination whether a particular statement comes within the terms of (e) and thus may be produced if related to the subject matter of the witness' testimony. Ordinarily the defense demand will be only for those statements which satisfy the statutory limitations. Thus the Government will not produce documents clearly beyond the reach of the statute for to do so would not be responsive to the order of the court. However, when it is doubtful whether the production of a particular statement is compelled by the statute we approve the practice of having the Government submit the statements to the trial judge for an *in camera* determination. Indeed, any other procedure would be destructive of the statutory purpose."

On the trial in this case, however, when this question was presented—that is, when it is doubtful if "a particular statement comes within the terms of (e)", whether the prosecution or the court resolves the doubt—the trial judge ruled that this is a determination to be made not by him, but by the prosecution (R. 232-36; 636-45). The ruling flatly contradicts *Palermo*.

B. The trial judge also pursued an improper course when the prosecution contended that Congressional investigators and government attorneys are not agents of the government within the meaning of subsection (a) of Sec-

tion 3500 (R. 201, 208-09).[26] The court expressly refused to decide that issue (R. 527), but instead, required the defense to lay a foundation by cross-examining the three witnesses in chambers to determine whether they had in fact made statements, as defined in subsection (e), to Congressional investigators or government attorneys. After such cross-examination (*Eckert*: R. 364-98, 453-71, 508-21; *Gardner*: R. 785-844; *Mason*: R. 956-86), the court denied the motion for the production of statements about petitioner which Eckert had made to a Senate investigator (R. 315-20, 364-67) and all three witnesses had made to government attorneys (R. 383-98, 453-71, 508-20, 811-12, 833-44, 956-66, 983-85) because the defense had not shown that there were "statements" as defined in subsection (e) (R. 200, 208-09, 380-83, 523-27, 845-47, 986-88).

The opinion of the court below correctly proceeds on the unspoken premise that "statements" to the Senate investigator and to the government attorneys are producible, but says that "there is nothing in the record to indicate" that the witnesses had made "statements" to such persons. App. B, *infra*, p. 73. The court thus approves the procedure whereby the trial judge placed on the defense the well-nigh impossible burden of showing that there were "statements" made to such agents. But *Palermo* declares that no such foundation is necessary. If there are "statements" in the possession of the government, Section 3500 requires that they be produced. There is no more reason for the defense to have the task of showing that there are "statements" when they were made to Congressional investigators and government attorneys than in the cases when they were made to FBI or tax agents, for example. The trial judge should have ruled that Congressional

[26] The government did not make such an argument in *Lev* v. *United States*, 360 U. S. 470, which involved a Senate investigator, or in *Rosenberg* v. *United States*, 360 U. S. 367, which involved an Assistant United States Attorney.

investigators and government attorneys are agents as defined in subsection (a) and should then have required the government to produce "statements" made to them by the witnesses.

C. The two rulings of the trial court, if correct, would give rise to questions under the *ex post facto* and due process clauses because the rulings deprived petitioner of access to relevant statements of the witnesses, in the one case because the prosecution and not the court decided whether doubtful statements met the requirements of (e), and in the other, because the court did not require the prosecution to produce whatever statements it had that the witnesses had made to the Senate investigator and to government attorneys.

Since petitioner was indicted in October, 1954, while Section 3500 became law on September 2, 1957 (71 Stat. 595), the application of Section 3500 to his case in a manner which thus operated to his "substantial disadvantage" violated the *ex post facto* prohibition. *Lindsey* v. *Washington*, 301 U. S. 397, 401-02. See also, *Calder* v. *Bull*, 3 Dall. 386, 390; *Putty* v. *United States*, 220 F. 2d 473, 476-78 (C. A. 9).

As applied in this case, Section 3500 also violates due process. Even on its face, subsection (e) is of doubtful constitutionality because the standards it requires of statements made to agents of the government, as distinguished from statements made to others, are arbitrary and have no reasonable relationship to the use of the statements for impeachment. This is "mere legislative fiat". *Manley* v. *Georgia*, 279 U. S. 1, 6.

In any event, to give the prosecutors the unreviewable power to withhold statements made by the witnesses when they, the prosecutors, are in doubt whether the statements meet the standards fixed by subsection (e) and the power to withhold statements made to Congressional investi-

gators and to attorneys for the government unless the defense can establish that there are such statements in existence, is to impose unreasonable and arbitrary restrictions on the right of cross-examination.

The power of Congress to regulate the rules of evidence in the federal courts is subject to due process. *Tot v. United States*, 319 U. S. 463; *Benton* v. *United States*, 232 F. 2d 341 (C. A. D. C.) Section 3500, as applied by the trial court, violates due process.

V. Questions relating to the admission and exclusion of evidence.

A. Eckert's "can't resign" testimony was improperly admitted.

Eckert was permitted to testify that during his membership in the Communist Party, which terminated in 1948, the policy of the Party was "that once having joined [it] you could not leave without being expelled." (R. 196). There was no evidence that petitioner had knowledge of any such policy or that the policy was in effect at the time of his resignation in 1949 or when he executed the affidavits in 1951 and 1952. However, the trial court refused to instruct the jury that it could not consider the Eckert testimony unless it found from other evidence that petitioner knew of the existence of the "can't resign" policy at the time of his resignation (Supp. R. 2). Finally, the existence of the supposed policy rests solely on Eckert's bald assertion, unsupported by any factual foundation.[27]

[27] The testimony is contrary to data which establish that there have been massive resignations from the Party throughout the period of its existence. See, e.g. J. Edgar Hoover, *Masters of Deceit*, p. 5; Chap. 9; Howe and Coser, *The American Communist Party*, pp. 528-29.

This testimony of Eckert's was plainly prejudicial and its admission was erroneous.

First, the testimony was irrelevant. The court below stated, App. A, *infra*, p. 58, that it "was probative of the second side of the question of membership, *i.e.* whether the Party was willing to accept the defendant and recognize him as a member." This statement misconceives the issue in the case which was whether petitioner *believed himself* to be a member at the time he signed the affidavits. Obviously, the "can't resign" policy is of no probative value on this issue since, so far as the evidence shows, petitioner was totally unaware of the existence of the policy. Although the court below acknowledged that the Eckert testimony "could show nothing of the state of mind of the defendant," it nevertheless held that "the evidence of the Party's policy was relevant in the interpretation of the defendant's statements and behavior" App. A, *infra*, pp. 58, 60. But a fact of which petitioner was ignorant and which therefore can reveal nothing about his state of mind is, by the same token, of no possible help in interpreting his statements and behavior.[28]

Second, the testimony was incompetent. As the court below recognized, App. A, *infra*, p. 60, knowledge of the supposed policy cannot be imputed to petitioner from his membership in the Party. Accordingly, Eckert's testimony was rank hearsay.

Third, the evidence shows that if the no-resignation policy was ever in effect, it was abandoned prior to the date when petitioner resigned. For it appears from the testimony of the prosecution witness Mason that the Party

[28] Even Section 5 of the Communist Control Act does not make the fact that the Communist Party has listed the accused as a member relevant to prove membership unless the accused had knowledge of the listing.

had agreed to and endorsed petitioner's resignation as "the best policy for us in the unions to follow." *supra*, p. 7.

Fourth, the admission of Eckert's unsupported opinion on a critical issue of fact usurped the function of the jury. *United States* v. *Spaulding*, 293 U. S. 498, 506; *Simmons* v. *United States*, 206 F. 2d 427, 429-30 (C. A. D. C); *Wesson* v. *United States*, 164 F. 2d 50, 54-55 (C. A. 8).

Finally, as Judge Bazelon in *United States* v. *Gold*, 237 F. 2d 764, 772, rev'd on other grounds, 352 U. S. 985, points out concerning similar testimony by Eckert and others in that case:

> "Such general testimony is not direct evidence of what appellant did or did not do. If no one can effectively resign from the Party, no union officer with appellant's history can ever comply with Section 9 (h), and the statutory phrase 'is not a member' is precisely equivalent to 'has never been a member'. This possibility *Douds* specifically rejects."

In other words, if petitioner could not resign from the Party, then 9(h) becomes a bill of attainder.

The question presented by the admission of Eckert's testimony is an important one which is likely to arise in other cases involving proof of continuing membership in the Communist Party and it should therefore be reviewed by the Court.

B. Cross-examination of the prosecution witnesses was improperly restricted.

On cross-examination, the trial court prevented the defense from trying to show that Mason, a naturalized citizen and an ex-Communist, became an informant for the FBI (R. 868-69) and testified against petitioner because he feared denaturalization and deportation (R. 934-41).

The trial court also ruled that the defense could not show, on cross-examination, that the labor organizations of which Eckert and Gardner were officials at the time they testified were rivals and competitors of Mine, Mill (*Eckert*: R. 481-83. *Gardner*: R. 735-38, 760-65, 815-18, 848).

In its opinion, the court below points out that although cross-examination is a matter of right, its scope may reasonably be limited by the trial judge. App. A, *infra*, p. 63. We agree. However, in this case, the limitations imposed were unreasonable and an abuse of discretion. Cross-examination with respect to legitimate matters bearing on the interest, bias, and prejudices of the witnesses was cut off entirely. Cf. *District of Columbia* v. *Clawans*, 300 U. S. 617, 632.

Mason—In the case of Mason, who had become a naturalized citizen in 1938 (R. 934-36), the defense attempted to show by cross-examination that the Immigration and Naturalization Service was investigating and had interrogated him in 1952 because Congress had provided in 1950 (in the Internal Security Act of 1950, 50 U. S. C. 781) for the deportation of aliens on the ground of past Communist Party membership; that Mason, aware of the change in the law, had become fearful that he might be denaturalized and deported and was seeking advice about the effect of the law on his status; and that, because of this fear, he had become an informant for the FBI and a witness against petitioner after his interrogation by the Immigration and Naturalization Service (R. 934-41).[29]

[29] As we have said, the Immigration Service interrogated Mason in 1952. In 1953, when he was still a Mine, Mill Executive Board member, we find him making confidential reports to the FBI about petitioner (R. 868-69). In 1954, he first testified publicly against petitioner and Mine, Mill in the Labor Board proceeding upon which this Court passed in *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145 (R. 872-74). In 1955, he was a witness on petitioner's first trial on this indictment (R. 872).

The trial judge ruled that this line of cross-examination was improper unless the defense could show that the government had actually made a threat or a promise to Mason in connection with his status as a citizen (R. 939-41). The court below, on the other hand, upheld the trial judge not on that ground, but on the ground that the inference that Mason was coerced to testify against petitioner because of fear of denaturalization and deportation was rebutted by the fact that since he had disclosed his past Communist Party membership when he was naturalized in 1938, he could not have been denaturalized under the 1950 law. App. A, *infra*, p. 64. But the defense *is* entitled to show by cross-examination that the attitude and state of mind of a witness has been affected by threats or promises by the government or by the hope of reward or of more favorable treatment. *Alford* v. *United States*, 282 U. S. 687, 693-94; *Gordon* v. *United States*, 344 U. S. 414, 422-23; *Spaeth* v. *United States*, 232 F. 2d 776 (C. A. 6); *United States* v. *Hogan*, 232 F. 2d 905 (C. A. 3). And since the question relates to the actual state of mind of the witness and his motives for testifying, it is also proper to show a belief on the part of the witness that, if he testifies, he will receive some benefit or favorable treatment from the government, even if there is no rational basis for such a belief. *Farkas* v. *United States*, 2 F. 2d 644, 647 (C. A. 6). This was what the defense was trying to show in Mason's case. It was therefore immaterial that no threat or promise may have been made to him or that the government could not effect a change in his status as a citizen.

Eckert and Gardner—At the time he testified, Eckert was assistant director of the Die Casting Department of the United Automobile Workers (R. 42) and had been associated with that union since shortly after he left Mine, Mill in 1948 (R. 481). It was under his leadership that some local unions of Mine, Mill changed their affiliation at that time to the U.A.W. (R. 482). The trial judge did not permit the defense to show, by cross-examination, that the U.A.W.

had been Mine, Mill's principal competitor in the East since 1948 and that the two organizations had opposed each other in many Labor Board elections (R. 481-83).

At the time he testified, Gardner had been a consultant and conciliator for the International Hod Carriers, Building and Common Laborers Union of America since January, 1956, a few months after he had been discharged by Mine, Mill (R. 583, 735). After the defense had asked him several questions about the rivalry between the Hod Carriers Union and Mine, Mill without objection by the prosecution (R. 735-37), the trial court, *sua sponte*, stopped the line of questioning (R. 737) and instructed the jury to disregard the testimony the witness had already given on the subject (R. 848). In arguing on the trial for the propriety of this line of cross-examination of Gardner, the defense stated that it sought to develop that the Hod Carrier's Union was not just another rival of Mine, Mill's, but that it had sought to absorb Mine, Mill altogether, by merger or otherwise; that Gardner had been personally involved in such efforts; and that only a month earlier, the Hod Carriers Union had been one of the two unions which had voted against a successful resolution at the convention of the Metal Trades Council, AFL-CIO, that Mine, Mill be granted a charter by the AFL-CIO (R. 760-65, 815-18).

The court below held that since it is proper to restrict cross-examination on matters having "only a slight and indirect bearing on the bias and credibility of a witness", the trial court correctly ruled that the evidence petitioner thus sought to elicit from Eckert and Gardner "was too remote to be admissible". App. A, *infra*, p. 65.

To say that the rivalry between the unions has "a slight and indirect bearing" on the state of mind of Eckert and Gardner as witnesses is to deny the facts of life. It is generally recognized that the rivalries between labor organizations and between their leaders are as bitter and as passionate as any in our society. If George Meany

were to testify against James Hoffa in a criminal case, for example, it is hard to believe that the defense would not be permitted to show the existence of the dispute between the AFL-CIO and the Teamsters as bearing on Meany's state of mind.

The court below acknowledges that in civil cases, it is proper to show that the witness has an indirect interest in the dispute between the parties by virtue of his employment,[30] but distinguishes this as a criminal case, in which the employers of the witnesses had no interest. App. A, *infra*; p. 65. But such a distinction is artificial and unrealistic, since the bias of witnesses like Eckert and Gardner arising from the rivalry of the unions might be ever more lively in a criminal case against a Mine, Mill leader than, for example, in a suit for money between their respective organizations and Mine, Mill. In the competition for membership, a conviction of petitioner in a case like this would have much greater impact than a mere money judgment against Mine, Mill. In any event, it has been held in criminal cases that, for example, fraternal lodge affiliation (*Felice* v. *State*, 18 Okla. Cr. 313, 194 Pac. 251), enmity between families (*Ham* v. *State*, 21 Ala. App. 103; 105 S. 390), and even race and nationality (*People* v. *Krug*, 10 Cal. App. 2d 172, 51 P. 2d 445), have

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[30] Citing *Central Truck Lines* v. *Lott*, 249 F. 2d 722 (C. A. 5), where the witness tesified for his employer; *Majestic* v. *Louisville and N. R. Co.*, 147 F. 2d 621 (C. A. 6), where the employer of the witness had an interest in the recovery; *Lexington Glass Co.* v. *Zurich etc. Ins. Co.*, 271 S. W. 2d 909 (Ky. App.), where the witness was employed by the law firm representing the party for whom he testified; *Manley* v. *Northumberland County*, 32 F. Supp. 775 (M. D. Pa.), where the employer of the witness was a competitor of the party against whom the witness testified. In *Lee Way Motor Freight, Inc.* v. *True*, 165 F. 2d 38, the court below had agreed that a witness may be cross-examined about his membership in an organization of which one of the parties is a member or as to whether he and the opposite party are not adherents of rival political factions. 165 F. 2d at 41.

a bearing on the state of mind of a witness. Cf. *District of Columbia* v. *Clawans*, 300 U. S. 617, 630-31, holding that it was error to restrict the cross-examination of railroad detectives in a prosecution for illegal traffic in train tickets.

The range of evidence which may be elicited for the purpose of discrediting a witness as to his interest, motive, and bias is "very liberal". Wigmore, *Evidence* (3rd Ed., 1940), sec. 944, p. 495. In the application of this principle, no distinction has been made between civil and criminal cases. See the *Clawans* case, *supra*, at 632; *Alford* v. *United States*, 282 U. S. 687, 694; *King* v. *United States*, 112 Fed. 988, 995-96 (C. C. A. 5); *Majestic* v. *Louisville and N. R. Co.*, 147 F. 2d 621, 627 (C. A. 6). As this Court recently observed: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend". *Napue* v. *Illinois*, 360 U. S. 264, 269. But in this case, as in *Alford*, the trial judge "cut off *in limine* all inquiry" into subjects "with respect to which the defense was entitled to a reasonable cross-examination". 282 U. S. 687, 694.

VI. The question of venue.

The court below, in its opinion reversing petitioner's first conviction, App. B, *infra*, p. 78,[31] held that there was venue jurisdiction in the District of Colorado, where petitioner executed and mailed the two affidavits to the Labor Board in Washington, D. C. (R. 42-50; Govt. Exs. 1-6, R. 1242-47). This conclusion is in conflict with *United States* v. *Valenti*, 207 F. 2d 242, in which the Court of Appeals for

[31] The issue was preserved on the second trial by the motion to dismiss the indictment (R. 7-10), the motion for a judgment of acquittal (R. 1093), and the motion for a new trial (R. 24-6).

the Third Circuit held that since the act denounced by Section 1001, read in the light of Section 9 (h), is the act of filing the false affidavit with the Labor Board, no offense is committed until the affidavit is actually filed with the Board.[32]

A. Although no other courts of appeals have had occasion to decide the precise issue, the *Valenti* case was followed in two unreported opinions in the same case which passed on similar problems of venue under indictments alleging the filing of false financial statements with the Department of Labor under Section 9 (g) of Taft-Hartley, *United States* v. *Gibbons and Brown,* Crim. No. 27848 (3) and Crim. No. 28017 (2), E. D. Mo., E. Div. The *Valenti* case has also been aproved in dicta. *Hupman* v. *United States,* 219 F. 2d 243, 247 (C. A. 6), cert. denied, 349 U. S. 953; *United States* v. *Bryson,* 16 F. R. D. 453 (N. D. Calif., S. Div.).

B. The decision of the court below is also inconsistent with a number of cases, arising under Section 1001 (otherwise than in connection with Section 9(h)) and under other statutes, which illustrate the general principle that where the offense relates to the filing of false documents or to the presentation of fraudulent claims, the crime is committed only where the documents are filed or presented to the agency of the government. *Section 1001: United States* v. *Borow,* 101 F. Supp. 211 (D. N. J.). *Filing false tax returns: Bowles* v. *United States,* 73 F. 2d 772 (C. C. A. 4), cert. denied, 294 U. S. 710; *Wampler* v. *Snyder,* 66 F. 2d 195 (C. A. D. C.). *Other statutes: Reass* v. *United*

[32] Valenti was a local union officer, who lived and whose office was in New Jersey, and who, as the officer of a local union, was required to file his affidavit with the regional office of the Labor Board in Philadelphia. Valenti was prosecuted in New Jersey and thus the issue concerning venue was the same as in this case, where petitioner, as a national union officer, was required to file his affidavits with the Labor Board itself in Washington, D. C. (R 13. See also, App. B, *infra,* p. 78, n. 2).

States, 99 F. 2d 752 (C. C. A. 4); *Shurin* v. *United States*, 164 F. 2d 566 (C. C. A. 4). The principle is the corollary to the principle which has been settled since *United States* v. *Lombardo*, 241 U. S. 73, that when a statute requires the filing of a certain document, the offense of failing or refusing to file is committed at the place where the document is required to be filed, not where the accused resides or where he happens to be when he defaults. Cf. *Johnston and Sokol* v. *United States* and *United States* v. *Patteson*, 351 U. S. 215.

C. The court below relied on the continuing offense statute, 18 U. S. C. 3237, for its conclusion that although the filing of the affidavits in Washington completed the offenses, the offenses were begun and continued in the District of Colorado by the making and mailing of the affidavits and therefore could be prosecuted there. App. B, *infra*, pp. 82-3.

Reliance on the continuing offense statute is misplaced. Venue is determined by "the nature of the crime alleged and the location of the act or acts constituting it". *United States* v. *Anderson*, 328 U. S. 699, 703. In this case, the crime under Section 1001, in the light of Section 9(h), is the crime of *filing* a false affidavit with the Board. Until the affidavit is filed, there is no "matter within the jurisdiction" of the Labor Board, as required by Section 1001.

It begs the question, then, to rely on the continuing offense statute. If the offense consists in filing, it is not an offense "begun in one district and completed in another * * *", under Section 3237; it cannot be atomized into a beginning, a continuation, and a completion. It is committed at only one time and at only one place—when the affidavit is filed with the Labor Board in Washington, D. C.

When it has served its argument in another connection in other cases, the government has used this very analysis

as to what constitutes the offense under Section 1001 arising out of the filing of a false affidavit under Section 9(h) and has cited the *Valenti* case in support of the analysis. Thus, in arguing against the application of the perjury rule of evidence in *Gold* v. *United States,* 237 F. 2d 764 (C. A. D. C.), rev'd on other grounds, 352 U. S. 985, the government's brief says (p. 95):

> "Furthermore, it is not the false *swearing* but the *filing* with the National Labor Relations Board of a false affidavit which constitutes the offense defined by 18 U. S. C. 1001 read in the light of 29 U. S. C. 159(h). *United States* v. *Valenti,* 207 F. 2d 242 (C. A. 3). Hence, even where a false non-Communist affidavit is executed, no offense under these sections is committed unless and until the affidavit is filed with the Board. *Id.* at 244.[33]

In passing on a different point in a recent decision, the court below itself adopted the rationale of the decision in the *Valenti* case. In *Sells* v. *United States,* 262 F. 2d 815, cert. denied, 360 U. S. 913, also a prosecution under Section 1001 for the filing of a 9(h) affidavit, the appellant argued that there was a fatal variance between the indictment and the proof because the indictment charged that the offense was committed on or about August 12, 1952, while the proof was that the affidavit was executed on June 3, 1952. (Since Sells was an officer of a local union, he had filed his affidavit at the office of the Labor Board in Denver. There was no issue as to venue because Sells had also executed his affidavit in Denver). In rejecting

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[33] The government made the same argument, also in connection with the perjury rule, in its brief (pp. 48-9) in *Fisher* v. *United States,* 231 F. 2d 99 (C. A. 9).

Even though we agree that the offense is the offense of filing, the perjury rule is still applicable to proof of the false swearing, as we have argued, *supra,* p. 11. Although the crime as such is not committed until the affidavit is filed, the question of falsity presents the central issue of proof.

the contention that this was a fatal variance, the Court cited the *Valenti* case with approval, at 821:

> "However, the crucial act was the filing of the affidavit with the Board on August 12, 1952. Until the affidavit was filed it was not a matter within the jurisdiction of the Board.[34] The pertinent provisions of sec. 1001 apply to one who 'makes or uses' a false writing. Here the use was the filing with the undenied acquiescence of the defendant. There was no variance."

If the "crucial act" is the act of filing the affidavit, in this case it was not an act which was begun or continued in Colorado. The act of filing took place in Washington, D. C.

D. This case illustrates that questions of venue in criminal cases raise "deep issues of public policy". *United States* v. *Johnson*, 323 U. S. 273, 276. Since, like Gold, this petitioner could have been prosecuted in the District of Columbia, this is not the case of an offender who had to be prosecuted in Colorado or not at all. In such a case, it is not wise public policy for the government to have the choice of an alternative place for trial.[35]

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[34] Here, the court cited the *Valenti* case, as well as *Hupman* v. *United States*, 219 F. 2d 243, 247 (C. A. 6), cert. denied, 349 U. S. 953.

[35] Although Sections 9(f), (g), and (h) of Taft-Hartley have now been repealed by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959 (P. L. 86-257), the reporting provisions of the new Act (Title II, Sections 201-10), are much more comprehensive and all-embracing than the compliance provisions of Taft-Hartley. All reports are required to be made to the Secretary of Labor. Since the number of persons subject to prosecution under the new Act will be much greater than under Section 9 of Taft-Hartley, the likelihood that the question of venue in this case will also arise under the new Act is also much greater.

Conclusion

For the foregoing reasons, this petition should be granted. However, the attention of the Court is respectfully directed to the pendency of a petition for a writ of certiorari in *Travis* v. *United States*, No. 945, Oct. Term, 1958, in a proceeding under Rule 33 of the Federal Rules of Criminal Procedure for a new trial on the basis of newly discovered evidence relating to the credibility of the witness Gardner. A second such motion, also relating to Gardner, was filed on April 29, 1959 and will be heard in the District Court on October 19, 1959. The petition in No. 945 (pp. 12-13) suggested that the Court defer action thereon pending disposition by the court below of the appeal from the conviction and the filing of this petition (if the conviction were affirmed) and also pending disposition by the courts below of the second motion for a new trial. In its brief in opposition in No. 945 (pp. 11-12), the government advised the Court that it did not oppose this suggestion.

We respectfully suggest, therefore, that the Court defer action on this petition, as well as on the petition in No. 945, until the disposition of the second motion for a new trial by the courts below.

Respectfully submitted,

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APPENDIX A

Opinions Below

August 3, 1959

Before Phillips, Murrah and Lewis, Circuit Judges.

Lewis, Circuit Judge. This action is here on appeal for the second time. On the first appeal,[1] this court set aside a conviction under the false statement statute, 18 U. S. C. A. 1001,[2] and ordered a new trial because of prejudicial error committed when the prosecutor was allowed to improperly cross-examine appellant's character witnesses. The present appeal is from a second conviction after retrial of the case in the United States District Court for the District of Colorado. Reversal is sought upon a claim of insufficiency of the evidence to support the verdict and numerous assertions of prejudicial error committed during the trial. Appellant also challenges the constitutionality of 18 U. S. C. A. 3500 both as to its provisions and as construed and applied by the trial court.

The appellant, Maurice E. Travis, was convicted by a jury on four counts of an indictment charging him with falsely and fraudulently attesting that he was not an affiliate or member of the Communist Party in two "Affidavits of Non-Communist Union Officers" he executed as a national officer of the Internationl Union of Mine, Mill

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[1] Travis v. United States, 10 Cir., 247 F. 2d 130.

[2] "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any fales, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10.000 or imprisoned not more than five years of both."

and Smelter Workers.[3] The first affidavit was executed on December 19, 1951, and the other on December 3, 1952, and Mine-Mill filed them with the National Labor Relations Board in compliance with the provisions of Section 9(h) of the National Labor Relations Act as amended by the Labor Management Act of 1947 (29 U. S. C. A. 159(h).)[4]

Following conviction, appellant was fined $2,000 and sentenced to serve a four-year term of imprisonment on each of two counts of the indictment. No fine was imposed as to the remaining two counts, but he was sentenced to four-year prison terms on both to run concurrently with the terms imposed on the other counts. Thus he was sentenced to a total of eight years in prison and fined $4,000.[5]

Since appellant challenges the sufficiency of the evidence we shall summarize that evidence urged by the government as ample basis for the jury verdict. This consists primarily of the testimony of three former Communist Party members who associated with Travis in various capacities as officers of Mine-Mill. Their testimony indicates that in 1942 Travis was employed by Mine-Mill

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[3] Hereafter called Mine-Mill.

[4] "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, * * * and no complaint shall be issued pursuant to a charge made by a labor organization * * * unless there is on file with the Board an affidavit executed * * * by each officer of such labor organization * * * that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. * * * *"

[5] The judgment giving rise to the instant appeal differed from the judgment at the first trial in that fines of $2,000 were imposed on all four counts at the former trial making a total fine of $8,000.

as coordinator for the area of Northern California. He was at that time a member of the Communist Party with an assignment to carry on the Communist Party activities among the Mine-Mill workers in his area. Thereafter, he advanced to positions of prominent leadership in the Mine-Mill Union becoming Assistant to the President in 1946, Vice President in 1947 and President later that year. He has been Secretary-Treasurer of the Union from 1948 until the time of trial. There was extensive evidence of Travis's activities as a Communist Party member prior to 1949. No prolonged description of his actions will be undertaken here except to point out that as he progressed to positions of national leadership in Mine-Mill he was able to use those positions to further the interests of the Party. Illustrative of the scope of his activities is the evidence that in 1946 the Communist Party designated a group of its members who were prominent Mine-Mill leaders to coordinate the Communist activities within Mine-Mill with a view to controlling the union proper. Although not an official organization of Mine-Mill, this group became known as the "Steering Committee." Travis was one of the initial members of the Steering Committee and its frequent meetings for planning Party strategy and organizing activities within the Union were usually presided over by him "or some other ranking Communist official." His influence in these meetings was notable. On one occasion he stated to the other committee members that since the Party had gained a majority of votes on the Executive Board of Mine-Mill they should effect certain changes in Union staff and that previous actions taken by the anti-Communist faction of the Board should be reversed. These proposals were subsequently adopted by the Mine-Mill Executive Board. On another occasion Travis, as a member of the Steering Committee, participated with national officers of the Communist Party in planning strategy for the selection and support of Party-

approved candidates for the international officers of Mine-Mill. The resultant strategy was later substantially carried out at a Mine-Mill national convention.

In 1947, Congress amended the National Labor Relations Act so as to restrict enjoyment of the collective bargaining advantages of its provisions to labor organizations whose officers had filed affidavits attesting that they were not members of or affiliated with the Communist Party (29 U. S. C. A. 159(h)).

The government introduced into evidence a copy of a public statement made by Travis in the union paper by which he declared that he had resigned from the Communist Party in order to comply with the new Taft-Hartley amendment. It then undertook to show that the resignation was merely a pretense and that in fact Travis's member hip in the Party continued during the period material to this conviction. The evidence in this regard delineated a Communist labor meeting in New York called to decide whether the Party would advocate that its members sign the non-Communist affidavits under the new law. It was decided that Party policy would be against signing. Appellant participated in that meeting. Later, when he reported the decision to Party members of his own union he asked his fellow Communist Gil Green if the teachings of V. Lenin, to the effect that Communists working inside trade unions must remain there at all costs, including the use of artifice or device to do so, were applicable to their situation. Green replied affirmatively and pointed out that labor leaders could circumvent the law by belonging to a Thursday afternoon social club'' since the law pertained only to present membership and not past or future membership.

Following the passage of the non-Communist affidavit requirement of the Taft-Hartley law, the Mine-Mill Executive Board adopted a policy of non-compliance, thereby

exercising its option as provided by the Act. Non-compliance, of course, resulted in inability of the union to receive the advantages of utilizing N. L. R. B. facilities for filing charges of unfair labor practices and participation in Board elections. When it became apparent that loss of advantages to the union was causing difficulty, the Mine-Mill Executive Board by resolution reversed its previous position and adopted a policy of compliance. Travis was a member of the Executive Board when that decision was made. His statement to government witness Mason, set forth *infra*, at the time he wrote his "resignation statement" indicated that his action was in accordance with Communist Party policy. This resignation statement was published in the Union paper on August 15, 1949.[6]

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[6] Excerpts from this public resignation statement illustrate its general tenor:

> "Since the interest of the International Union is uppermost in my mind, I have been confronted with the problem of resigning from the Communist Party, of which I have been a member, in order to make it possible for me to sign the Taft-Hartley affidavit. I have decided, with the utmost reluctance and with a great sense of indignation, to take such a step. My resignation has now taken place and as a result, I have signed the affidavit.
>
> *"This has not been an easy step for me to take. Membership in the Communist Party has always meant to me, as a member and officer of the International Union, that I could be a better trade unionist: it has meant to me a call to greater effort in behalf of the union as a solemn pledge to my fellow members that I would fight for their interests above all other interests.* (Emphasis in original.)
>
> "The very premise of the Taft-Hartley affidavits is a big lie, the same sort of lie that misled the people of Germany, Italy and Japan down the road to fascism. It is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union. On the contrary, trade unions are an integral part of a Socialist society, the kind of society in which Communists

Appendix A—Opinions Below

The government evidence pertaining to appellant's continued Party membership after the resignation statement showed that in the fall of 1951 Travis used government witness Fred Gardner, who had been recently employed by Mine-Mill, to assist him in crossing the border into Canada. Travis explained to Gardner that he was having difficulty crossing the border because of his membership in the Party and the public resignation statement and that it would be easier to cross in Gardner's car because it would not be recognized by Canadian police. He stated that Gardner had come to him well recommended by the Communist Party of Cleveland, Ohio, and that he was glad of that. Travis expressed regret that his public resignation had been necessary in order for Mine-Mill to conform to the Taft-Hartley filing requirements and in discussing this he said that he " * * * believed it was a mistake because it gave the enemies of the Party an op-

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believe. Therefore, I believe that good Communists are good trade unionists."

* * *

"AT THE SAME TIME, I want to make it absolutely clear that my opinion contin ies to be that only a fundamental change in the structure of our society, along the lines implied in the very words of the charter of our International, 'Labor produces all wealth—wealth belongs to the producer thereof,' can lead to the end of insecurity, discrimination, depressions and the danger of war.

"I am convinced that capitalistic greed is responsible for war and its attendant mass destruction and horror, I am convinced it is responsible for depression, unemployment and the mass misery they generate. * * *"

* * *

"Therefore, I want to make it crystal clear that my belief in Communism is consistent with what I believe to be the best interests of the members of this Union and the American people generally and that I am especially happy to be able constantly to remember that it is consistent with the finest traditions of the International Union."

portunity to use that in pointing out that this wasn't a true resignation from the Party, that actually it was done merely to conform to the Taft-Hartley affidavits * * *"

Relative to membership after execution of the first affidavit (December 19, 1951), witness Mason testified that in March of 1952 Travis stated to him that the Soviet delegation at the World Federation of Trade Unions in Paris, France, was demanding that the "American left-wing unions" who had been expelled from the Congress of Industrial Organizations form a "third federation." He said that the Communist Party had left it up to those in the unions to make the decisions and asked Mason what his view was. Travis expressed agreement with Mason's response that he opposed such a move and said that "the boys in the other unions" concurred and had left it to him, Travis, to communicate the reply to Paris.

The evidence postdating the execution of the second affidavit indicated that in March 1953 a staff conference of Mine-Mill was held in Denver, Colorado, for the discussion of organizational and political action. At this conference Travis handed to witness Mason a copy of the proposed conference agenda. Mason examined the outline of the legislative program contained therein which listed a number of items such as "repeal of the McCarran Act" and "fight against witch-hunting" and called Travis's attention to the fact that nothing was listed pertaining to betterment of workers. Travis agreed and directed that matters suggested by Mason be included. However, later that day, Travis told Mason "these other things, too, like repeal of the McCarran Act, are important, and he said 'When they get us Communists they will be after people like you if we don't get these laws repealed.' "

In June 1953, witness Gardner was to be transferred by Mine-Mill to a new assignment in the Coeur d'Alene Mining District of Idaho. Travis instructed him to stop in Denver, Colorado, on his way to Idaho for a "briefing

on the Coeur d'Alene situation. Pursuant thereto, Gardner met with Travis in Denver and was told that because of a factional dispute between Communist Party members of Mine-Mill in Coeur d'Alene he was to "remain aloof" from Party activity until further notified. Travis stated that he felt assured that the dispute would be resolved by the expulsion of the leader of the faction opposing the Party regional officers and instructed Gardner that once the problem was resolved he would be contacted by someone whom Travis would identify to him beforehand and that at that time Gardner could reactivate himself in the Party.

In August 1953, witness Mason had a conversation with Travis in Butte, Montana, in which he accused appellant and his Communist Party associates of trying to undermine the leadership of Mine-Mill District Number 1 while they were in the midst of a bargaining conflict with employers. Mason stated that he was aware that this was done because the District 1 leadership opposed Communist domination of Mine-Mill, that some of the men in Montana were very angry about the situation and that he was addressing himself to Travis as the leader of the Party in the union. Appellant made no denials but suggested that he would like to take the matter up with the "boys in Denver." He suggested that Mason meet him in a few days in Denver to talk things over. In compliance Mason met Travis in Denver and again expressed his opposition to various activities in Mine-Mill including his view that the union paper constantly criticized the foreign policies of the United States without once attacking the position of the Soviet Union. Travis answered that Mason's position was in direct opposition to the Party and that he was not being realistic if he thought appellant could change the policies of the paper. Appellant continued, stating that the Communist Party leadership in Mine-Mill felt that there should be no compromises "and that he, Travis,

is one of those in the Party who thinks that there have been too many compromises already, that [Mason did] not grasp the new situation, that the Soviet Union is becoming stronger, and that the position of the Communists in the Union has been stronger, we have been able to, he said, repulse the raid and hold this union and other unions." Mason threatened an open fight on the Communist issue and Travis pointed out that he would have seasoned fighters, the machine and the paper, to use against Mason in such a fight. Travis then concluded the conversation by telling Mason: "You and Joe [Mason's brother] were invited to get into the Party, had you done so, you would be sitting high in the councils of this organization with us, but you failed to do so."

Many of the points raised in appellant's brief were considered by this court in the recent case of Sells v. United States, 10 Cir., 262 F. 2d 815, and need not again be treated at length. As to the evidentiary question involved, the Sells case stands for the proposition that prosecution under the false statements statute is not defeated by a temporary "resignation" for the purpose of signing the affidavits only. Evidence of active participation on a continuing basis both before and after the crucial time of signing and filing the affidavit is sufficient evidence from which the jury might infer that membership continued during the time in question.

Appellant has urged that the perjury rule of evidence must apply to convictions for false statements under Section 1001, 18 U. S. C. A., and that since the government's case is concededly circumstantial the evidence is legally insufficient to sustain the verdict, cf. Rodomsky v. United States, 9 Cir., 180 F. 2d 781; Spaeth v. United States, 6 Cir., 218 F. 2d 361. However, in the Sells case, this circuit followed the view of the 7th and 9th circuits, that the court-established rule governing the quantum of evidence required in a prosecution for perjury, viz.,

falsity of the statement must be shown by the testimony of two independent witnesses or other corroboration, is inapplicable to a prosecution under Section 1001. United States v. Killian, 7 Cir., 246 F. 2d 77; Fisher v. United States, 9 Cir., 231 F. 2d 99; Fisher v. United States, 9 Cir., 254 F. 2d 302; see also Hupman v. United States, 6 Cir., 219 F. 2d 243. Hence, the trial court did not err in submitting the case to the jury without instructing in accordance with the perjury rule.

The evidence of Travis's continued membership in the Party stands uncontradicted. Appellant made no attempt to affirmatively rebut the government evidence on that issue nor did he introduce evidence of his purported resignation. Instead, his defense consisted primarily in extensive cross-examination of prosecution witnesses in an endeavor to impeach and discredit their testimony. He also introduced the testimony of character witnesses as to his reputation for truth and veracity. Of course, the absence of rebutting evidence, is no way relieves the government from meeting the burden of proof. Nevertheless, it is a fundamental principle of appellate review in criminal cases that once the jury has concluded, as it did here, that the guilt of the accused was proven beyond a reasonable doubt, it is not the province nor the function of this court to weigh the evidence or to test the credibility of witnesses. United States v. Green, 7 Cir., 246 F. 2d 155. Furthermore, we are limited in the scope of our review to a determination of whether there is substantial evidence to support the verdict, Wilcoxon v. United States, 10 Cir., 231 F. 2d 384, and must view the evidence in the light most favorable to the government, Evans v. United States, 10 Cir., 240 F. 2d 695. With these principles in mind, a careful review of the voluminous record persuades us that the jury verdict is amply sustained by cumulative proof that appellant's Communist Party membership was not

severed by the purported resignation and that he was a Party member on the dates crucial to this decision.

There is no necessity to consider the sufficiency of the evidence under the "affiliation" counts of the indictment because no fines were imposed thereon and the prison sentences on those counts were made to run concurrently with the prison sentences of the "membership" counts. Lawn v. United States, 355 U. S. 339 at 359, 78 S. Ct. 311, 2 L. Ed. 2d 321; Hirabayshi v. United States, 320 U. S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774; Roviraro v. United States, 353 U. S. 53 at 59, fn. 6, 77 S. Ct. 623, 1 L. Ed. 2d 639.

Appellant contends, but without merit, that the statements of the affidavits, shown by the evidence and found by the jury to have been false at the time they were made, were not "material" because the union did not utilize the N. L. R. B procedures after recognition by the National Labor Relations Board. Recognition was granted the Mine-Mill as a result of the Travis filing among others, which indeed must have been his intent in filing, and the false statement was "capable of influencing the decision of the tribunal in making a determination required to be made," Weinstock v. United States, C. A. D. C., 231 F. 2d 699, 701. The materiality of the false statement is tested not by the union's use of the N. L. R. B.'s facilities but by the union's achievement thereby of a status which carries with it the right to invoke the benefit of the National Labor Relations Act. Sells v. United States, supra.

The government's witness Eckert testified that during the time that he was a member of the Communist Party, 1931 to 1948, it was the continuing policy of the Party "that once having joined the Communist Party you could not leave without being expelled." Defendant objected to the introduction of the evidence, asserting that the testimony was based upon opinion unsupported by facts, that it was unconnected in time with the date of defendant's

resignation in 1949 or the filing of the affidavits in 1951 and 1952, and that it was an attempt by the government to impute guilt by association.

Most assuredly, the evidence was probative of the second side of the question of membership, i.e. whether the Party was willing to accept the defendant and recognize him as a member, and hence admissible, but without more it could show nothing of the state of mind of the defendant and could not show that he did not, in fact, resign from the Party on the date he claimed. As was said by Judge Bazelon in a special opinion written in Gold v. United States, 237 F. 2d 764, rev. on other grounds 352 U. S. 985:

> "If no one can effectively resign from the Party, no union officer with appellant's history can ever comply with sec. 9(h) and the statutory phrase 'is not a member' is precisely equivalent to 'has never been a member'. This possibility Douds specifically rejects." (See American Communications Association v. Douds, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925.)

Defendant sought to have given to the jury an instruction which could be understood to limit the purpose of the admission of this testimony, but the trial court ruled that, considered with other evidence in the record, the evidence was relevant and probative of whether or not defendant's resignation was a true resignation or a mere sham to obtain the benefits of the National Labor Relations Act for Mine-Mill. Upon this premise, counsel argued to the jury that numerous persons, including the government's witnesses, had left the Party, regardless of the Party's policy.

Whether or not the jury could properly infer from the related evidence that the defendant continued to act in obedience to this policy and that his resignation was under-

stood to be in form only determines whether the court was correct in refusing to circumscribe its use by the jury. 1. Wigmore, Evidence, sec. 13.

In 1948, a meeting in New York City was held among persons of significance in the trade unions and the Communist Party[7] including the defendant and the government witness Eckert, who related what transpired. The National Trade Union Secretary of the Communist Party presided and stated that the purpose of the meeting was to determine whether or not Communist officials in the unions should be granted permission by the Party to sign the non-Communist affidavits. Despite speeches protesting that the unions were not appearing on election ballots because of lack of compliance with the law, it was decided that Communist union men would not sign the affidavits. Travis's reaction to the decision was one of support and obedience. The Mine-Mill adopted the policy of not signing the non-Communist affidavits.

Subsequently, Travis told another government witness, Mason, that the union was becoming more and more concerned because of the losses of elections and that the Communist Party had been again discussing whether the Communist union officials should sign the affidavits. In a second conversation with Mason in July, 1949, Travis offered him a copy of his resignation statement, which was later published in the union's paper, and said that the statement had been cleared with Ben Gold and the Party

[7] In attendance besides Travis and Eckert, were William Z. Foster, National Chairman of the Communist Party, Eugene Dennis, General Secretary, Ben Gold, a member of the Central Committee and an official of the Fur Workers Union, John Williamson, National Trade Union Secretary of the Communist Party, Arnold Johnson, Ohio State Secretary of the Party, and officials of the Farm Equipment Union, Furniture Workers Union and Electrical, Radio, and Machine Workers Union.

people in New York. He told Mason that "the Party thinks this is the best policy for us in the unions to follow."

In October, 1951, Travis had a conversation with the witness Gardner: "* * * we very briefly discussed his resignation from the Party in which he pointed out that he believed that resignation, that public resignation was a mistake because it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely to conform to Taft-Hartley affidavits, and they recognized, the enemies of the Party recognized that this was not an actual resignation, * * *"

Thus the evidence of the Party's policy was relevant in the interpretation of the defendant's statements and behavior, and is not analogous to the prohibited imputation drawn from membership alone that a member endorses fully all of the precepts of the Party. Cf. Schneiderman v. United States, 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796; Nowak v. United States, 356 U. S. 660, 78 S. Ct. 955, 2 L. Ed. 2d 1048; Maisenberg v. United States, 356 U. S. 670, 78 S. Ct. 960, 2 L. Ed. 2d 1056.

The charge that Eckert's testimony on this point was opinion unsupported by facts going to the main issue results from a confusion in the record as to whether Eckert was testifying as an expert. Eckert's position of knowing what Party policy was during the time of his membership was shown through evidence similar to that customarily evoked to qualify an expert, but he testified as to a fact within his knowledge rather than giving an opinion as an expert.

The trial court did not instruct the jury that there was a presumption, in absence of contradicting evidence, either that the Party's policy of no resignations continued or that Travis's membership, having been admitted prior to the alleged resignation and inferentially shown subsequent to that time, continued during the time the affidavits were

filed. The factual effect of the evidence was left to the jury. That body might well have drawn an inference unfavorable to appellant. See Jencks v. United States, 5 Cir., 226 F. 2d 540, 547, rev'd on other grounds 353 U. S. 657.

Appellant urges that Eckert's testimony was remote, irrelevant and inflammatory because early in the proceedings defense counsel offered to stipulate that Travis had been a Party member from 1941 to August 1949 and Eckert could show no more than an adherence to Party principles until 1948. Since a man's state of mind must necessarily be shown from his statements and conduct, the prosecution bore the burden of demonstrating a continuation of activities and attitudes similar to those performed and held by Travis during the time of his admitted membership after the date of his purported resignation. The evidence of how extensively, actively and zealously Travis had worked as a Party member and his leadership in the Party was clearly relevant to the question of whether or not the resignation was a mere pretense. If it is true that evidence of Communist Party activities has a tendency to provoke present-day juries toward prejudice, it is ridiculous to suppose that the attitude of the public against a crime will prevent its prosecution. If the evidence has probative value, it is ordinarily admissible regardless of an imagined reaction of the jury, Suhay v. United States, 10 Cir., 95 F. 2d 890.

Appellant insists that the trial court improperly restricted his cross-examination of prosecution witnesses by not allowing him to show that witness Mason was a government informant through fear of deportation and that Eckert and Gardner were members of a labor organization with rival interests to those of Mine-Mill. As to Mason, the evidence showed that he had been a member of the Communist Party for a brief period in the early 1930's. In cross-examining Mason, defense counsel elicited the information that he had become a naturalized citizen in 1938 and that prior to his naturalization the United States Im-

migration and Naturalization Service had questioned him about his past Party membership. The defense then asked Mason if he was again questioned by that Service about the same matter in 1952. The government objected to the question as improper cross-examination and counsel were heard in chambers. The defense argued that it wanted to show that the witness had an interest in testifying. Counsel suggested that Mason knew that Congress passed the McCarran Act providing for deportation of aliens on grounds of past membership in the Communist Party and asserted that it sought to elicit evidence that government agents had held out promises or threats to Mason fo induce him to testify. The government insisted that the purpose of the defense was merely to embarrass the witness. The court then addressed defense counsel as a member of the Bar of the Court and asked if he knew of anything which would substantiate the charge. Defense counsel responded that he had no knowledge of promises or threats but said he had been informed that during the pertinent period the witness was very concerned about his status as an alien and was "going around asking people questions" about it. The court then sustained the government objection stating that it did not think the inference that there were threats or promises was warranted.

Cross-examination of a witness is a matter of right, The Ottawa, 3 Wall. 268, 271, and cannot be circumscribed by the courts where the questions propounded are within the framework of his testimony on direct examination, except to the extent the witness himself claims privilege or constitutional protection. However, the demonstration of a witness's bias almost always requires a search of his conduct and the circumstances of his situation, which facts may be irrelevant to the issues at trial but important to the litigants as a safeguard against false or colored testimony. III Wigmore, Evidence, § 943. Prolonged digressions from

the matters at hand for the purpose of exploring the manners and morals, hopes and fears, beliefs and conflicts of a personality whose connection with the trial occurs merely because of his position as a spectator can as readily abort the process of justice as can a denial of the right of cross-examination. Thus, it has long been held that the scope of cross-examination seeking to discredit the witness may be reasonably limited by the court responsible for the trial of the case. In Blitz v. United States, 153 U. S. 308, 312, 14 S. Ct. 924, 38 L. Ed. 725, where a question seeking to impeach a deputy marshal was not permitted, the court stated:

> "The question was clearly irrelevant, and was properly excluded. The reasons, whatever they may have been, that induced the witness not to arrest the defendant when the latter voted the second time in the same election, did not throw any light upon the issue to be determined. If the object was to test the accuracy or credibility of the witness, it is quite sufficient to say that the extent to which a cross-examination may be allowed for such a purpose—especially where, as in this case, the question had no reference to any matter disclosed by the examination-in-chief—is largely subject to the sound discretion of the trial court, and the exercise of that discretion is not reviewable upon writ of error; certainly not where the question, upon its face, suggests nothing material to the inquiry whether the defendant is guilty or not guilty of the specific offense charged in the indictment."

Certain classes of facts such as family relationship to a party have been held to so strongly give rise to inferences relevant to the witness's interest and bias as to leave no room for an exercise of discretion in admissibility.

III Wigmore, Evidence, § 948. Among these always admissible circumstances is the fact that the witness for the prosecution is under indictment or in custody at the time of trial, Alford v. United States, 282 U. S. 687, 51 S. Ct. 218, 75 L. Ed. 624; District of Columbia v. Clawans, 300 U. S. 617, 57 S. Ct. 660, 81 L. Ed. 843. But these cases do not govern the situation of the witness Mason in the present case and, in fact, reaffirm the view of the Blitz case that, in the absence of an abuse of discretion, the decision of permitting or excluding extrinsic evidence for impeachment purposes rests with the trial judge. As stated by Professor Wigmore, new circumstances will constantly be presented as suggestive of personal prejudice and the trial court must determine whether from the conduct, language or circumstances of the witness a palpable hostility to one party or sympathy for the other is inferable.

The inference that the witness Mason was coercively influenced to testify by a power over him held by immigration officials requires imagination to be applied in disparagement of facts appearing in the record. Mason is a naturalized citizen, not an alien subject to deportation. If wild surmise permit the deduction that he had committed a fraud in his application for citizenship by concealing his membership in a subversive group, which might be used to return him to an alien status, such conjecture is dispelled by his revelations to the Service in 1938. Therefore, we find no abuse of discretion on the part of the trial court in excluding the question as to the witness's more recent contacts with immigration officials.

As to the cross-examination of Eckert and Gardner, appellant argues that it was error for the trial court to sustain objections to questions concerning alleged rivalries between Mine-Mill and the labor organization then employing those two witnesses. The trial court in ruling on the matter expressed the view that any possible inference that could be drawn from a showing of such rivalry

would be too remote to be relevant. In arguing that this was error, appellant cites authorities for the proposition that it is within the proper scope of cross-examination to show that the witness is testifying for his employer,[8] that his employer has an interest in the recovery,[9] is employed by the law firm representing the party for whom he testifies,[10] or when his employer is a business competitor of the party against whom he testifies.[11] He also cites a decision of this court to the effect that it is proper to probe the employment of a witness where he is an adjuster for a group of fire insurance companies, possibly interested in the suit, where the action sought damages for negligent installation of a furnace.[12] However, none of those cases has gone so far as appellant asks that we go here. Each of those cases was a civil action in which the employer had some interest in the outcome of the suit. But this is a criminal action and it is brought against Travis, not against Mine-Mill. What appellant asks is that he be allowed to show rivalry between the unions in order to impute prejudice against Mine-Mill to the witness and then asks the jury to infer therefrom bias against Travis. It is not reversible error to restrict cross-examination questions having only a slight and indirect bearing on the bias and credibility of a witness. District of Columbia v. Clawans, supra. The trial court correctly ruled that the evidence was too remote to be admissible.

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[8] Central Truck Lines v. Lott, 5 Cir., 249 F. 2d 722.

[9] Majestic v. Louisville and N. R. Co., 6 Cir., 147 F. 2d 621.

[10] Lexington Glass Co. v. Zurich General Acc. and Liab. Ins. Co., Ky. App., 271 S. W. 2d 909.

[11] Manley v. Northumberland County, D. C. M. D. Pa., 32 F. Supp. 775.

[12] Theurer v. Holland Furnace Co., 10 Cir., 124 F. 2d 494.

Appellant next complains of the instructions to the jury concerning the meaning of membership in and affiliation with the Communist Party.[13] He argues that the

[13] The trial court instructed the jury as follows:

"Whether or not the defendant was a member of the Communist Party at the times alleged in the indictment is a question of fact which you are to determine from all of the evidence in the case. In determining this question you must bear in mind that the burden of proof rests on the Government to prove the defendant guilty beyond a a reasonable doubt. Membership or lack of membership in the Communist Party may be established by direct as well as circumstantial evidence.

"Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those person(s) who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

"Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the times alleged in the indictment, you may take into consideration the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

"In determining whether or not the defendant was a member of the Communist Party at the times alleged in the indictment, you may take into consideration whether the defendant: 1. Has made himself subject to the discipline of the Communist Party in any form whatsoever; 2. Has executed orders, plans, or directives of any kind of the Communist Party; 3. Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party; 4. Has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the organization;

5. Has been accepted to his knowledge as an officer or member of the Communist Party or as one to be called upon for services by other officers or members of the organization; 6. Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the Communist Party; 7. Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization; 8. Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization; 9. Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the Communist Party or to anyone else in behalf of the objectives of the organization; 10. Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization; 11. Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization.

"These are some of the indicia of Communist Party membership but you are not limited solely to those I have enumerated. As sole arbiters of the facts it is your duty to consider all the evidence either direct or circumstantial which bears upon the question of whether or not the defendant was a member of the Communist Party on the dates alleged in the indictment.

"In determining this question, you must bear in mind that the burden of proof rests upon the Government to prove the defendant guilty beyond a reasonable doubt. If you find that the Government has sustained this burden by proving beyond a reasonable doubt, that the defendant was a member of the Communist Party on December 19, 1951, and December 3, 1952, as alleged in the indictment, and if you find also that the Government has proved beyond a reasonable doubt the other essential elements of the offense charged in the first and fourth counts of the indictment, as I have outlined them to you, then you must find the defendant guilty as to the first and fourth counts.

"If, however, you find that the Government has not sustained the burden of proving beyond a reasonable doubt that the defendant was a member of the Communist Party on the dates

definition of "membership" used by the court was so all embracing and vague as to be meaningless destroying as a consequence any distinction between "membership" and "affiliation." We see no substance to this contention. In charging the jury with respect to the components of Communist Party membership and affiliation the trial court carefully followed the directions of this court expressed in the opinion on the first appeal.[14] The instructions were meaningful and clear. They included 11 of the 14 indicia of membership outlined by Congress in Section 5 of the Communist Control Act of 1954 (50 U. S. C. A. 844) and emphasized the primary element of membership as suggested by Mr. Justice Burton in Jencks

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alleged in the indictment, then you must find him not guilty as to the first and fourth counts.

"'Affiliation' as used in the second and fifth counts of the indictment is not the same as membership. The word 'affiliated,' as used in the second and fifth counts of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite period upon a fairly permanent basis.

"'Affiliation' includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving a reasonable cause for the charge of a breach of good faith.

"Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you, ladies and gentlemen, are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence." (Record 1228-1230)

[14] 247 F. 2d 130, at 135 and 136.

v. United States, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed., 2d 1103, i. e.: "* * * there must be present the desire on the part of the individual to belong to the Communist Party and recognition by that Party that it considers him as a member." This adequately outlined the kind of acts that could be considered evidence of membership and included the idea of the continuing reciprocal relationship necessary for that status.

The jury was told that Travis's membership in the Communist Party at the times alleged in the indictment was to be determined from "all the evidence in the case" and that they were not limited solely to consideration of the indicia of membership enumerated by the court. However, this in no way indicates, as appellant contends, that the jury was told it was free to consider anything in evidence as proof of membership. The court went on to clarify: "* * * it is your duty to consider all the evidence * * * *which bears upon the question of whether or not the defendant was a member of the Communist Party on the dates alleged in the indictment.*" (Emphasis added). Furthermore, it must be presumed that the jury, after such careful instructions on the components of membership, is perfectly capable of separating evidence which tends to prove membership from evidence which does not. Appellant also argues in this connection that the instructions left the jurors free to use single items of evidence standing alone as the basis for their findings. Such was not the case. They were instructed that isolated acts or statements were circumstances they could consider, but were cautioned that these were not in themselves conclusive proof of membership and were only to be considered in connection with the other evidence, that they were to weigh all the evidence bearing on the crucial issues, and that the government retained the burden of proving guilt beyond a reasonable doubt.

Nor is there any merit to the contention that the jury was left free to infer membership at the time of signing the affidavits from appellant's past Party membership or from the conclusion that the resignation was not honest. The instructions clearly contravene this argument:

> "The crucial issue of fact in this case is whether on December 19, 1951, and December 3, 1952, Maurice E. Travis was or was not then a member of the Communist Party or affiliated with such party.
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> "The affidavits do not call upon any person to state whether or not in the past he has ever been a member of the Communist Party or affiliated with it. A person who has been at some time in the past either a member of the Communist Party or affiliated with that Party but who has terminated such membership or affiliation prior to the making of the affidavits would be entitled to sign the affidavits under oath without violating the law.
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> "Since the affidavits speak in the present tense only, the fundamental issue of fact for you to decide is whether or not at the times alleged in the indictment the defendant knowingly and wilfully used an affidavit which was false and which he knew to be false at that time."
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> * * *
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> "You may not presume the existence of a fact and then infer from such presumed fact the existence of any other fact or circumstance. You may not infer from any presumed fact or facts that the defendant is guilty of any of the offenses charged in the indictment."

It is urged that the trial court should have clarified what bearing the pre-affidavit and post-affidavit evidence had on guilt and that it should have pointed out which

evidence was relevant to each affidavit. We do not agree. The court should not be required to emphasize particular portions of the evidence. To require trial courts to suggest to the jury the inferences which may be drawn from the evidence would be to invite error. Radius v. Travelers Ins. Co., 9 Cir., 87 F. 2d 412. Further, it would be an invasion of the province of the jury to judicially measure the weight of circumstances which the jury can determine equally as well. Majestic v. Louisville & N. R. Co., 6 Cir., 147 F. 2d 621.

Further error is alleged in the refusal of the court to give several requested instructions. We shall not lengthen this opinion by discussing appellant's many contentions in this regard. It is sufficient to say that the instructions given to the jury were complete and proper. Moreover, the jury was admonished with particularity as to all the safeguards that should properly surround a criminal prosecution. The rejected instructions added no proper charge which was not covered by those actually given and there was no error in refusing to give them.

After each of the government witnesses had testified on direct examination at the trial, appellant moved that the prosecution be required to produce all reports and statements previously made by those witnesses to any agent of the government as provided under 18 U. S. C. A. 3500. The motions were granted but since the government claimed that the statements of each witness contained matter not related to the subject matter of his testimony as a witness, the trial court, pursuant to Section 3500(c), examined the statements *in camera* and excised the unrelated matters before delivering them to appellant.

Appellant's claims anent the constitutionality of section 3500 were examined fully in the Sells case, supra. Inasmuch as the availability to the defense of documents held by the government is limited under the decision of Gordon v. United States, 344 U. S. 414, 73 S. Ct. 369, 97

L. Ed. 447, and Jencks v. United States, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, to matters relevant to the testimony of a witness for the prosecution, Section 3500 merely provides the procedure by which that relevancy may be determined and deprives the defendant of nothing to which he was formerly entitled. Of course, the excised portion of a statement must be available for review to test the correctness of the trial court's judgment in eliminating it from consideration by the defense.

The United States Supreme Court has held in recent decisions, Palermo v. United States and Rosenberg v. United States, decided June 22, 1959, that Section 3500 is constitutional and governs the rights of a defendant to the production of documents in the hands of the prosecution. Further, the court approved the *in camera* inspection by the trial court as the proper procedure to be followed in determining the application of the statute to the particular statements sought by the defense. We have carefully examined and compared the complete documents and the documents as they were submitted finally to the defense and conclude that the only excised portions related to matters and persons not connected with the present case.

Counsel for appellant has skillfully anticipated a great many problems which will yet arise before the administration of Section 3500 is stablized by precedent. Most of these problems are not made ripe for decision under the present case.

Appellant suggests that the trial court delegated its responsibility for the determination of whether or not certain documents contained "statements" within the purview of Section 3500(e) which should be made available to the defense. He contends that if the prosecution determine that no part of a statement relates to the subject matter or, if it does, that it is not a "statement" as defined in subsection (e), then the trial court never inspects the statement at all and it is not preserved for the record. "There is

appellate review if only part of a document is withheld from the defense; none, if the entire document is withheld." This problem was foreseen by the United States Supreme Court in the Palermo case, supra, and the production by the government of doubtful writings and in camera determination of the subject matter and whether it comes within the definition of "statement" of subsection (e) was approved. This ruling, however, does not aid appellant for the record shows merely that the three witnesses, Eckert, Mason, and Gardner, had talked with government attorneys in preparation for this case and that Eckert had talked to an investigator for a congressional committee. The subject of these conversations was Travis and Mine-Mill, but there is nothing in the record to indicate that these witnesses had in these instances written, signed, adopted or approved any writing or that any recording was made of any oral statement made to these agents. It is presumed that these agents took notes or made summaries of their conversations with the witnesses but such interpretations would not be "statements which could properly be called the witness' own words," Palermo v. United States, and the witnesses denied signing or adopting any such statements.

Appellant moved for the production of the witnesses' testimony before one or more grand juries. The theory that either the Jencks decision, Jencks v. United States, supra, or the Jencks Act, Section 3500, encompass grand jury testimony was discarded in Pittsburgh Plate Glass Co. v. United States (U. S.) decided June 22, 1959. Unlike the appellant in that case, however, appellant here moved the court for inspection of the grand jury minutes as a matter of right and alternatively to have the minutes produced for the court's examination and determination whether inconsistencies appeared between the witness's testimony before the grand jury and his testimony at trial.

Thus, the question here is the one particularly left undecided by the Pittsburgh Plate Glass case: Whether the

trial court may, in the discretion granted him under Rule 6(e), Fed. Rules Crim. Procedure, refuse to examine the transcription of the grand jury when requested to do so. Rule 6(e) provides:

> "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. * * *"

It has been held that instances when the need for disclosure of grand jury proceedings outweighs the countervailing policy maintaining the secrecy of such proceedings must be shown with particularity, United States v. Procter & Gamble Co., 356 U. S. 677, 78 S. Ct. 983, 2 L. Ed. 2d 1077. The burden is on the defense to show that "a particularized need" exists for the minutes which outweighs the policy of secrecy, Pittsburgh Plate Glass Co. v. United States, supra. Thus, where some portion of a defendant's testimony was impeached by the government's use of her grand jury testimony, it has been held that the trial court should make an inspection of all of her testimony for the purpose of disclosing other inconsistencies to the use of a co-defendant, United States v. H. J. K. Theatre Corporation, 2 Cir., 236 F. 2d 502, but this is a far cry from requiring a trial court to examine all of the testimony of all of the witnesses for the prosecution upon the defense's hope of thereby un-

covering some inconsistency. In view of prior statements of these witnesses made available to the defense, in which there appeared no suggestion of material inconsistency, it is unlikely that their statements to the grand jury occurring at a time between the giving of such statements and consistent statements upon trial would produce impeaching material. Appellant shows inaccuracies in the testimony of the witnesses (i.e. Gardner thought he had testified in another case the prior week but actually it was two weeks earlier; Eckert had testified on seven previous occasions against Mine-Mill but his testimony as to details was not precisely the same on each occasion; Gardner's evidence at trial was not shown on the reports which he made to the F.B.I.; Mason stated to the F.B.I. that he was "unable to enlarge" on information about appellant, but at trial gave other specific information); these inaccuracies might well give rise to argument concerning the witnesses' memories and powers of observation which were available to the defense from the materials produced by the government. They do not demonstrate a reason for believing that the witnesses' testimony was biased or impeachable on material. They do not compel the conclusion that the testimony before the grand jury requires further investigation.

Since the permission or refusal of a defense inspection of grand jury minutes rests in the discretion of the trial court, United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129, and since no showing was made of a particularized need for the grand jury minutes in the maintenance of the defense, Pittsburgh Plate Glass Co. v. United States, supra, we hold that the trial court did not abuse its discretion in failing to order the production of grand jury minutes in this case where difficulties have arisen not from the paucity of evidence but from its plethora.

Affirmed.

MURRAH, Circuit Judge, dissenting. In the first place, I would apply the perjury rule for the reasons so well stated by Judge Bazelon in Gold v. United States, 237 F. 2d 764. As in that case, the charge is false swearing, the evidence is indeed indirect and circumstantial, and in my judgment inconclusive. The only reason assigned for the inapplicability of the ancient and accepted perjury rule requiring direct and positive evidence of guilt, is that in cases of this kind, its application would "merely thwart the attainment of the end which Congress sought to accomplish by the enactment of Paragraph 9(h)." See Sells v. United States, 262 F. 2d 815. But there is nothing in the legislative history of Section 9(h) to indicate that the Congress entertained the view that the perjury rule was inapplicable to prosecutions under Section 1001, as in Section 1621. See Judge Bazelon in the Gold case, Note 17. While feeling myself bound by the pronouncements of my court in the Sells case, I cannot refrain from expressing the hope that such is not the law in cases of this kind.

I would reverse this case and remand it for a new trial for the refusal of the trial court to examine the grand jury evidence in camera, to determine whether the lid of secrecy ought to be lifted in the interest of the proper administration of criminal justice. We know that grand jury testimony may be disclosed only upon a showing of a particularized need, and the burden of showing that need is on the one seeking it. But if the rule is to have any efficacy, its burdens ought not to be insurmountable.

How then may the accused lay a foundation for requisite inconsistency when he does not have access to the testimony of any other means except cross-examination in the hope that something will turn up? In our case the cross-examination of the prosecuting witnesses disclosed that they had testified in numerous cases of this

kind, as well as before the grand jury which has indicted the accused. There were some inconsistencies in the testimony they had given in other open proceedings. But there was no conceivable way of showing a particularized need unless the accused could get the grand jury testimony before the court.

It is for these reasons that we have committed to the trial court the judicial function of determining ex parte whether the testimony of the witnesses is substantially consistent. And, the court cannot exercise that important function unless he knows something of the witnesses' testimony. It would seem therefore that the trial court erroneously and prejudicially refused to take a judicial look at the grand jury testimony. Cf. United States v. Spangelet, 258 F. 2d 338. It may be that we would be justified in having the grand jury testimony certified for examination here, as was done in United States v. Lev, 258 F. 2d 9. Unless it is done, I certainly can't say that it was harmless error to refuse to look at it.

This case is important, not only to the accused here, but as a guiding precedent in other cases. I do not believe we can dispose of the question by simply saying that it was harmless.

APPENDIX B

Opinions Below, Reversing Petitioner's First Conviction

(Travis v. United States, 247 F. 2d 130)

July 15, 1957

Before PHILLIPS, MURRAH and LEWIS, *Circuit Judges*

LEWIS, *Circuit Judge.* The defendant was indicted in the United States District Court for the District of Colorado upon six counts alleging violation of the false statement statute, 18 U. S. C. 1001.[1] The Government dismissed two counts before trial and defendant was found guilty upon each of the remaining counts. The basis of defendant's conviction lies in the falsity of two "Affidavits of Non-Communist Union Officer" in which he swore he was "not a member of the Communist Party or affiliated with such party." Each of the affidavits was executed by defendant in Denver, Colorado, and mailed from Denver to the National Labor Relations Board in Washington, D. C. where they were received and filed pursuant to 29 U. S. C. 159(h).[2] Defendant was an officer of the International Union of Mine, Mill and Smelter Workers and it is agreed that the making and filing of the affidavits is a matter within the jurisdiction of an agency of the United States and that during the life of the affidavits Mine-Mill was in compliance with sections 9(f), (g) and (h) of the Labor Management Relations Act of 1947 and used the facilities of the N. L. R. B.

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[1] The court quoted Sec. 1001.

[2] The court quoted Sec. 9(h), and then pointed out:
"Travis was a national officer of Mine-Mill and was required by regulation and instruction of the N.L.R.B. to file with the Board in Washington."

Appendix B—Opinions Below, Reversing Petitioner's First Conviction

Upon conviction defendant was sentenced to imprisonment for four years on each of two counts, to run concurrently, and for four years on each of the other counts, to run concurrently, a total of eight years. Fines totaling $8,000 were also imposed.

Defendant on appeal does not challenge the sufficiency of the evidence to support conviction but seeks reversal upon claim of lack of jurisdiction in the Colorado court and numerous assertions of errors occurring during trial.

Since we conclude that a new trial must be granted we limit our consideration to matters requiring reversal and those contentions of appellant which will necessarily recur on retrial.

Travis did not testify at the trial and as a consequence his contemporary credibility was not at issue. He did, however, call as character witnesses four persons each of whom stated that Travis's general reputation for truth and veracity was good. Upon cross-examination, over objection, the trial court allowed the credibility of the character witnesses to be tested by inquiry as to whether or not the witnesses had heard: (1) that Travis had been convicted of criminal contempt of court in Grant County, New Mexico, and (2) that when Travis had been asked before the McCarran Committee of the United States Senate in Salt Lake City in October, 1952, if he was at that time a member of the Communist Party, he had refused to answer on the ground that it would incriminate him.

Before overruling objection to the questions the trial court very properly made inquiry as to the factual background of the assumptions contained in the questions. Both occurrences were admitted by Travis to be actualities, the criminal contempt conviction arising as a result of a labor dispute.

Appendix B—Opinions Below, Reversing Petitioner's First Conviction

In Michelson v. United States, 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168, it is said, "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." In attempting to prove a good reputation for truth and veracity Travis placed in issue those characteristics determinative of his capability of the commission of the crime charged—false swearing in a labor matter. Since lack of veracity is the very essence of the indictment of Travis an attempt by him to negative the existence in him of those traits existent in one guilty of such an offense places in issue all characteristics affecting reputation which explore the crime itself and the ability of the accused to commit the crime. So viewed, inquiry from the witness as to his knowledge of Travis's conviction for criminal contempt is relevant and as Michelson holds, inquiry is proper although "the crimes may be unalike, but both alike proceed from the same defects of character which the witness said the defendant was reputed not to exhibit." Those defects of character which would lead one to disregard the lawful order of the court in a labor dispute may well be the same defects which might lead one to falsely swear to the affidavits upon which the instant prosecution is based. See Hawley v. United States (10 Cir.) 133 F. 2d 966.

But the reasoning of Michelson clearly negatives the relevancy of examination relative to Travis's claim of constitutional privilege before the McCarran Committee. One who claims the rights and privileges of the Constitution most certainly does not exhibit a character defect of any kind and, if one who lawfully asserts the shelter of the Fifth Amendment becomes, in so doing, a person of guilt or a perjurer in the minds of some, the shame lies with those who misunderstand and not with him who is entitled to

protection. Cross-examination probing the witnesses' knowledge of Travis's claim of constitutional immunity during the McCarran hearing had, we believe, no proper probative value but if such existed it was, as stated by Mr. Justice Harlan in Gruenwald v. United States (decided May 27, 1957), "far outweighed by its impermissible impact upon the jury", had "grave constitutional overtones", and was fraught with "the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt * * *." The admission of this evidence necessitates a new trial. Gruenwald v. United States, supra; Curcio v. United States (decided June 10, 1957).

But appellant insists that the action should be dismissed in its entirety for lack of venue jurisdiction in Colorado. As noted, it is unquestioned that Travis executed and mailed the affidavits at Denver, Colorado. It is appellant's view that his "making and using" the false document was completed in Colorado, prior to the time when such activities became "a matter within the jurisdiction of any department or agency of the United States" and hence a federal crime. For this reason, he maintains that 18 U. S. C. 3237, known as the continuing offense statute, which provides that any offense against the United States begun in one district and completed in another, or committed in more than one district, may be prosecuted in any district in which the offense was begun, continued, or completed, does not apply. He neglects, however, to point out any possible use to which such a false affidavit might be put other than as a filing with the N.L.R.B. in Washington, which was his intent and his consummated purpose.

In the case of United States v. Valenti (3 Cir.) 207 F. 2d 242, the Third Circuit held that the act denounced by Section 1001 is the filing of a false noncommunist affidavit with the Board and that no crime is committed until the

affidavit, through its filing, has become the basis for action by the Board. Also, although the concurring opinion suggests that the case is based upon a failure of proof of mailing, the majority clearly holds that constructive filing by deposit in the mails is not sufficient to lay venue at the place of deposit. The court's rejection of the government's contention that the continuing offense statute should apply claims support in language of United States v. Lombardo, 241 U. S. 73, 36 S. Ct. 508, 60 L. Ed. 897. In the Lombardo case, the crime committed was a failure to file a required statement with a government agency and the Supreme Court understandably held that the accused could not be prosecuted at the place of his residence on the theory that the failure to deposit the statement in the mail is the beginning of a continuing offense. The distinction between a situation where the accused fails to file and one where he makes a false affidavit with the intent to file it with the Board and entrusts it to an irrevocable agency for that purpose is clear.

While we recognize the important issues of public policy involved in the setting of venue and the necessity of maintaining a taut rein against possible abuses by the prosecution and hardship to the defendant in a trial far from his abode, United States v. Johnson, 323 U. S. 273, 65 S. Ct. 249, 89 L. Ed. 236, it appears that such considerations are not present here and that this situation is precisely the one which Congress intended to reach by the continuing offense statute. This statute was applied in connection with Section 1001 in De Rosier v. United States (5 Cir.) 218 F. 2d 420, the court stating:

> "* * * When the letter containing the false statements and the fabricated document was prepared and forwarded to the Loyalty Board, there was set in motion the events culminated in the commission

> of the offenses charged. It would be an excess of literalism to say that the appellant was only preparing to commit the offense, and that the actual commission thereof had not in fact begun at the time and place from which the letter was sent, mailed, or forwarded to the Board. It is no answer to say that, by some fortuitous circumstance, the consummation of the crime might have been frustrated by the loss of the letter in transit, thereby rendering ineffectual the attempt to deliver the false statements. Necessarily, the commission of the offense must be viewed in retrospect. It is often not easy to draw a line between attempt and preparation; the former is such an intentional preparatory act as will apparently result, if not extrinsically prevented, in a crime which it was designed to effect."

The facts of this case parallel those of the De Resier case. 18 U. S. C. 3237 permits prosecution in any district where the offense was begun, continued, or completed and, therefore, venue was properly laid in the District of Colorado.

Appellant next contends that the indictment was fatally defective as duplicitous and in fact repugnant in its charge. Counts 1 and 2 of the indictment charged respectively that appellant filed a "false writing" with a government agency stating that he was not "then and there a member of the Communist Party" and that he was not "then and there affiliated with the Communist Party" on December 19, 1951. Counts 4 and 5 charged the same respectively as to December 3, 1952. Since, appellant argues, membership and affiliation are different statuses no person could hold both at the same time (repugnancy) and since, so says appellant, membership necessarily includes affiliation he is twice charged with the same offense. The obvious an-

swer to appellant's contention lies in the false premise of his argument. He is not charged with being a Communist nor with being affiliated with the Communist Party, but rather with having falsely represented that he held neither of these statuses.[3]

Various means used in committing the offense charged may be joined without duplicity. Silkworth v. United States (2 Cir.) 10 F. 2d 711. "Duplicity" in an indictment generally means the charging of two or more separate and distinct offenses in one count, not the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose. Frankfort Distilleries v. United States (10 Cir.) 144 F. 2d 824, reversed on other grounds, 324 U. S. 293. And, where a statute creates a single offense, but specifies in the alternative different acts, any one of which will constitute the offense, an indictment may charge the commission of such offense by all the means mentioned, using the conjunctive "and" wherever the statute uses the word "or" without being duplicitous. United States v. Dombowski (D. C. Mich.) 252 F. 894. His objections to the indictment must also fail if the indictment charges two offenses because

> "* * * a draftsman of an indictment may charge crime in a variety of forms to avoid fatal variance of the evidence. He may cast the indictment in several counts whether the body of facts upon which the indictment is based gives rise to only one criminal offense or to more than one. To be sure, the defendant may call upon the prosecutor to elect or, by asking for a bill of particulars, to render the

[3] The Ninth Circuit has held that an accumulative sentence may not be levied for separate counts alleging false denials of membership and affiliation, Fisher v. United States, 231 F. 2d 99. Since we are granting a new trial we consider this question presently premature.

various counts more specific. In any event, by an indictment of multiple counts the prosecutor gives the necessary notice and does not do the less so because at the conclusion of the Government's case the defendant may insist that all the counts are merely variants of a single offense." United States v. Universal C.I.T. Credit Corp., 344 U. S. 218, 73 S. Ct. 227, 97 L. Ed. 260.

Finally appellant complains of the court's instructions particularly as they define membership and affiliation. The trial court instructed:

"Membership in the Communist Party is the state or status of being one of those persons who belong to or compose that party. Not every relationship between an individual and an organization constitutes membership. An individual may be sympathetic or agree with all or part of the program of an organization and still not be a member. Isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with Communist Party or with its aims or policies are not conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in the case.

"The word 'affiliated', as used in the second and fifth counts of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a

> mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite period upon a fairly permanent basis.
>
> "Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving a reasonable cause for the charge of a breach of good faith.
>
> "Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you ladies and gentlemen are to determine from all the evidence in the case."

We believe the court's instructions on the meaning of affiliation to be proper. However in Jencks v. United States, decided June 3, 1957, Mr. Justice Burton criticized an instruction as to what constitutes membership, pointing out that the instruction failed to emphasize that the primary essential of membership is the desire of the individual to belong to the group and the recognition by the organization that it considers him as a member, and cited with approval Fisher v. United States, 231 F. 2d 99, 106-107. That case held that the jury should have been reminded of the components of the term membership rather than be supplied with synonyms. Under the Communist Control Act Congress has outlined fourteen indications of membership which the jury shall consider, upon the presentation of such evidence, in determining whether the accused is a member of the Communist Party, 50 U. S. C. A. 844. Certainly these indicia of membership may be shown through circumstantial evidence, as any other fact, but the facts thus established must show more than cooperation or sympathy with the Party's pol-

icies, which would be equally persuasive of mere affiliation. The instruction should be made more explicit upon the new trial.

Reversed and remanded for new trial.

MURRAH, Circuit Judge (concurring specially). I concur in the opinion of the court with one exception. I also think it was improper and prejudicial to allow the government to inquire of the character witness concerning the defendant's prior commitment as for contempt of court. Certainly one may "be committed as for contempt upon facts which would have no bearing upon his honesty or integrity * * *" State v. Sexsmith, 57 P. 2d 1249, 1252. There was nothing in the content of the question to indicate that the defendant's conviction for contempt of court bore any relationship whatsoever to his truth and veracity—the trait of character in issue.

APPENDIX C

Statutes Involved

1. 18 U. S. C. 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2. 29 U. S. C. 159 (h) (Section 9 (h) of Taft-Hartley) provides:[1]

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit, executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022 and 1023 of Title 18 shall be applicable in respect to such affidavits.

---

[1] Repealed by Section 201 (d) of the Labor-Management Reporting and Disclosure Act of 1959 (P. L. 86-257).

3. Section 5 of the Communist Control Act of 1954, 50 U. S. C. 844, provides:

In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated.

4. 18 U. S. C. 3500, the so-called "Jencks" law, provides:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any

statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such por-

tion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

5. 18 U. S. C. 3237, the so-called continuing offense statute, provides:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

APPENDIX D

Judgment Below

Forty Fourth Day, May Term, Monday, August 3rd, 1959.

Before Honorable Orie L. Phillips, Honorable Alfred P. Murrah and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Maurice E. Travis, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

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JAMES R. BROWNING, Clerk

No. 479 10

In the Supreme Court of the United States

OCTOBER TERM, 1959

MAURICE E. TRAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 479

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (Pet. App. A, pp. 47–75) and dissenting (*id.*, pp. 76–77) opinions in the Court of Appeals are reported at 269 F. 2d 928, 946. The majority (Pet. App. B, pp. 78–87) and concurring (*id.*, p. 87) opinions of the Court of Appeals reversing petitioner's conviction following his first trial are reported at 247 F. 2d 130, 136.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1959 (Pet. App. D, p. 93), and a petition for rehearing was denied on August 21, 1959. On September 8, 1959, Mr. Justice Whittaker entered an

order extending the time for filing a petition for a writ of certiorari to and including October 20, 1959, and the petition was filed on October 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the venue of petitioner's trial was properly laid in the United States District Court for the District of Colorado.

2. Whether the so-called "two witness" rule in perjury cases applies to a prosecution under the "false statement" statute (18 U.S.C. 1001) for filing a false non-Communist affidavit.

3. Whether the evidence is sufficient to support the verdict.

4. Whether inadmissible evidence was improperly received and cross-examination was prejudicially limited.

5. Whether petitioner was prejudicially deprived of any pre-trial statements of government witnesses by the trial court's rulings as to the application of 18 U.S.C. 3500.

6. Whether the trial court's instructions to the jury on the meaning of the terms "membership" and "affiliation" were correct and sufficiently informed the jury of the meaning of those terms.

7. Whether the trial court abused its discretion in denying petitioner's motions for production of grand jury testimony.

STATUTES INVOLVED

The pertinent statutory provisions (18 U.S.C. 1001; Sections 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, c. 120, § 101, 61 Stat. 136, 146 (29 U.S.C. 159(h));[1] Section 5 of the Communist Control Act of 1954, c. 886, § 5, 68 Stat. 777 (50 U.S.C., 1952 ed., Supp. V, 884); 18 U.S.C. 3500; 18 U.S.C. 3237) are set forth in Appendix C to the petition, pp. 88–92.

STATEMENT

Petitioner was charged, in four counts of a six-count[2] indictment (R. 3–6) returned in the United States District Court for the District of Colorado, with violation of 18 U.S.C. 1001, in that he falsely attested, in two affidavits executed on December 19, 1951, and December 3, 1952, and thereafter filed with the National Labor Relations Board, that he was not a member of (Counts I and IV) or affiliated with (Counts II and V) the Communist Party.

Following a jury trial, petitioner was found guilty on these four counts, but his conviction was reversed

---

[1] Section 9(h) was repealed on September 14, 1959, by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86–257, 73 Stat. 519. Section 504(a) of the new Act provides that no person who is or has been a member of the Communist Party may hold office in a labor organization or association of employers dealing with a labor organization during or for five years after the termination of his membership in the Communist Party.

[2] Two counts of the indictment, charging that petitioner falsely denied support of the Communist Party in each of two separate affidavits, were dismissed on motion of the Government prior to petitioner's first trial (R. 19).

and a new trial ordered on the ground that the trial court had permitted improper cross-examination of petitioner's character witnesses. *Travis* v. *United States*, 247 F. 2d 130 (C.A. 10); Pet. App. B, pp. 78–87. Upon a retrial, petitioner was again convicted on all four counts (R. 30). On appeal, the Court of Appeals affirmed his conviction (Pet. App. A, pp. 47–75), one judge dissenting (*id.*, pp. 76–77).[3]

The evidence adduced by the Government at petitioner's second trial may be summarized as follows:

Both affidavits were executed by petitioner as a national officer of the International Union of Mine, Mill and Smelter Workers, were mailed in Denver, Colorado, and were received by and filed with the National Labor Relations Board in Washington, D.C. The making and filing of the affidavits is a matter within the jurisdiction of an agency of the United States Government, *viz.*, the National Labor Relations Board. During the life of the affidavits, the Mine-Mill Union was in compliance with subsections (f), (g) and (h) of Section 9 of the National Labor Rela-

[3] Judge Murrah, who dissented, was of the opinion that the perjury rules of evidence—*i.e.*, that falsity must be established by two independent witnesses or by one witness and corroborating circumstances—are applicable to prosecutions, like petitioner's, under 18 U.S.C. 1001 for filing false non-Communist affidavits but, feeling bound by the decision of the court below in *Sells* v. *United States*, 262 F. 2d 815, 821–822, he did not rest his dissent on this ground (Pet. App. A, p. 76). He would have reversed on the ground that the trial court committed prejudicial error in refusing to inspect *in camera* the grand jury minutes of the testimony of three prosecution witnesses to determine whether such minutes should be turned over to the defense for impeachment purposes (*id.*, pp. 76–77).

tions Act, as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159 (f), (g) and (h)) (R. 43–46, 48–50; G. Ex. 1–6).

Petitioner, from 1942 through 1948, was an active, disciplined, and dedicated member of the Communist Party who played a leading role in formulating its policies, especially with respect to its program of infiltration into labor organizations (R. 75–84, 95–140, 160). During this same period, petitioner progressed steadily to positions of prominence and leadership within the Mine-Mill Union. Party co-ordinator of the Union in Northern California in 1942 (R. 75–76), he became Assistant to the President in 1946, Vice-President in 1947, and President later in the same year. In 1948, he became Secretary-Treasurer of the Union, a position he held at the time of trial (R. 604–605).

Petitioner's Party activities were intertwined with his activities as an officer of Mine-Mill. In 1946, the Communist Party designated a group of its members who were prominent Mine-Mill leaders (including petitioner) to co-ordinate the Party's activities within the Union (R. 80). This group, which was not an official organization of Mine-Mill, became known as the "Steering Committee" and its frequent meetings were usually presided over by petitioner "or some other ranking Communist official" (R. 81–84). Through the operation of the "Steering Committee," the Party was able to gain control of the Executive Board of Mine-Mill and influence its decisions (R. 99–107) and to plan strategy, often successful, for the

election of Party-approved candidates for international offices in the Union (R. 107–114).

In February 1948, following the enactment of Section 9(h) by the Labor Management Relations Act, a large group of leading Party members who held union offices, including petitioner, met in New York City. After an extended discussion of the problem, they decided that the Party's policy would be against compliance with the non-Communist affidavit provisions of the new Act (R. 126–130). Though personally opposed to this decision, petitioner, accepting the discipline of the Party, decided that he and other Communist officers of Mine-Mill should abide by it (R. 130–131). At a meeting of Party Mine-Mill leaders which petitioner attended shortly thereafter, various means of circumventing the law were discussed, including the organization by Communist labor leaders of "Thursday afternoon social club[s]" (R. 133). At the same meeting, it was pointed out that Communists working inside labor unions should remain in them at all costs and should, if necessary, use artifice and device to remain active in the labor movement (R. 132).

In accordance with the Party's position, the Executive Board of Mine-Mill, then controlled by petitioner and other Party members, decided that the Union would not require that its officers file non-Communist affidavits with the Labor Board (R. 606, 608, 140). This position, however, substantially impaired the Union's ability to compete with other unions (R. 611). Accordingly, in July 1949, the Mine-Mill Executive

Board, by resolution, reversed its previous position and adopted a policy of compliance (R. 610).

Shortly thereafter, petitioner showed government witness William Mason a copy of a statement purporting to evidence his resignation from the Party. He told Mason that the statement had been "cleared with * * * Party people in New York" and that "the Party thinks this is the best policy for us in the unions to follow" (R. 612–613). The August 15, 1949, issue of the Union paper contained an article by petitioner announcing that he had "resign[ed] from the Communist Party" "in order to make it possible for me to sign the Taft-Hartley affidavit" (G. Ex. 8, R. 1249). Government witness Kenneth Eckert testified that, based upon his experience in the Communist Party from 1931 to 1948, "the policy of the Party" was that "once having joined the Communist Party you could not leave without being expelled" (R. 196).

Following his purported resignation from the Communist Party in August 1949, petitioner made various comments or statements to government witnesses William Mason and Fred Gardner. Gardner testified, for example, that in the fall of 1951 (shortly before the execution and filing of petitioner's first affidavit but after his purported resignation) petitioner confided to him that his formal resignation from the Party in 1949 was a "mistake" because it had provided the "enemies of the Party" with an opportunity to point out that it was not a "true" resignation (R.

587–590, 591).[4] Other admissions bearing on continued Party membership, set forth in detail in the opinion of the court below (Pet. App. A, pp. 53–55), were made by petitioner to either Gardner or Mason in March 1952 (R. 615–618); and in March (R. 618–620), June (R. 519–594), and August (R. 624–633) 1953, after one or both of the dates his affidavits were filed with the National Labor Relations Board in December 1951, and December 1952.

ARGUMENT

1. Petitioner contends (Pet. 40–44) that the proper venue of his trial was not, as the court below held in its opinion reversing his first conviction (Pet. App. B, pp. 78, 81–83, 247 F. 2d 130, 133–134), in the District of Colorado, where he executed and mailed the two false affidavits to the National Labor Relations Board, but only in the District of Columbia, where the affidavits were received and filed with the Board (see R. 42–50; G. Ex. 1–6, R. 1242–1247).

Venue, however, was properly laid in the District of Colorado. Section 3237 of Title 18 of the United States Code, the so-called "continuing offense" statute, provides:

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[4] This testimony reads in pertinent part (R. 590):

"* * * we very briefly discussed his resignation from the Party in which he pointed out that he believed that resignation, that public resignation was a mistake because it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely to conform to Taft-Hartley affidavits, and they recognized, the enemies of the Party recognized that this was not an actual resignation, and in substance that is about what we discussed. * * *"

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

This case, as the court below held (247 F. 2d at 134; Pet. App. B, p. 83), falls within that language. The execution and mailing of the false affidavits in Colorado was the beginning of petitioner's illegal acts. Once he relinquished all control over the affidavits, his acts were complete; at that juncture he had set in motion a chain of events culminating in the completion of the offense, *i.e.*, the filing of the false affidavits with the Board in Washington, D.C. The offense was begun in one District—Colorado—and completed in another—Washington, D.C.—and venue lay in both districts. See *United States* v. *Lombardo*, 241 U.S. 73.[5] Cf. *De Rosier* v. *United States*, 218 F. 2d 420, 422 (C.A. 5) (sustaining a prosecution under 18 U.S.C. 1001 brought in the district where the false statement was mailed); *Bridgeman* v. *United States*, 140 Fed. 577, 591 (C.A. 9).

Petitioner is correct in asserting that there is a conflict with the decision of the Third Circuit in *United*

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[5] In *Lombardo*, this Court stated (p. 77):

"* * * where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done; or where it may be said there is a continuously moving act commencing with the offender and hence ultimately consummated through him, *as the mailing of a letter* * * *." (Emphasis added.)

States v. *Valenti*, 207 F. 2d 242, a Section 9(h) case in which it was held that the offense is triable only at the place where the false affidavit is received by the Board. We submit, however, that this conflict has no substantial future significance in view of the fact that Section 9(h) was repealed by Congress on September 14, 1959 (Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Stat. 519, Sec. 201(d)) and that it does not require resolution by this Court.

Petitioner states that there are extensive reporting provisions under the new statute (which is true), but ignores the fact that the reasoning of *Valenti* will not apply to those provisions. *Valenti* turns on the point that under Section 9(h) union officials were not required to file affidavits at all (though the failure to do so had consequences for the union). The court reasoned (1) that "there is no duty imposed upon union officers to make or file noncommunist affidavits" (p. 244); (2) that, accordingly, "until the affidavit has been delivered to the Board to be placed 'on file'" the matter is one "not yet * * * within the jurisdiction of the Board" (*ibid.*); and (3) that, since the "false statements" statute applies only to matters "within the jurisdiction of any department or agency of the United States," it does not come into play until the actual receipt of an affidavit submitted under Section 9(h).[6] In contrast to Section 9(h), the reporting provisions of the new statute are mandatory and there

[6] Judge Hastie concurred in the *Valenti* decision on the limited ground that the Government had not adequately shown that the mailing occurred in the district where venue was laid.

is thus, on the Third Circuit's own reasoning, a breach of statutory duty as soon as the reporting party engages in the initial act of making a false report.

2. There is no merit to petitioner's various arguments (Pet. 11–19) addressed to the sufficiency of the evidence.

(*a*) Petitioner contends (Pet. 11–14) that he was erroneously convicted on the basis of circumstantial evidence and that the rule of evidence applicable in prosecutions for perjury under 18 U.S.C. 1621—*i.e.*, that the falsity of the statements must be established by two independent witnesses or by one witness and corroborating circumstances [7]—is likewise applicable to prosecutions under 18 U.S.C. 1001. However, the decisions uniformly hold that the so-called "two witness" perjury rule is inapplicable to prosecutions under the so-called "false statement" statute. See *Sells* v. *United States*, 262 F. 2d 815, 821–822 (C.A. 10), certiorari denied, 360 U.S. 913; *United States* v. *Killian*, 246 F. 2d 77, 82 (C.A. 7), reversed on rehearing on other grounds, 246 F. 2d 82; *Gold* v. *United States*, 237 F. 2d 764 (C.A.D.C.), reversed on other grounds, 352 U.S. 985; *Fisher* v. *United States*, 231 F. 2d 99, 105–106 (C.A. 9). See, also, *Hupman* v. *United States*, 219 F. 2d 243, 247 (C.A. 6), certiorari denied, 349 U.S. 953 (holding that a violation of 18 U.S.C. 1001 for filing a false non-Communist affidavit may be proved by circumstantial evidence). As the court below noted in the *Sells* case, *supra*, at p. 822:

[7] See *Weiler* v. *United States*, 323 U.S. 606, holding that conviction for perjury may not rest on uncorroborated testimony of a single witness, and that the jury must be so instructed.

> The application of the perjury rule to a prosecution for violation of § 1001 by a false non-communist affidavit would merely thwart the attainment of the end which Congress sought to accomplish by the enactment of § 9(h). An essential element of "membership" is the desire of an individual to belong to an organization. Affiliation imports less than membership but more than sympathy and requires "an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities." Desire to belong and an intent to adhere and further rather than merely sympathize are mental states. They can and must be proved or disproved by circumstantial evidence. A requirement of direct proof is a requirement of the impossible. * * *

(*b*) There is likewise no merit to petitioner's contention (Pet. 14–16) that his conviction below violated the rule, enunciated in *Opper* v. *United States,* 348 U.S. 84, that a conviction may not be based on uncorroborated extra-judicial admissions of the accused made after the alleged commission of an offense. To begin with, *Opper* does not appear to be applicable to the type of "admissions" made by petitioner in the instant case. The *Opper* case dealt with the quantum of evidence, corroborative of an extra-judicial admission or confession made to *law-enforcement authorities,* required to sustain a conviction. The requirement that there be some such corroborative evidence (see *Opper, supra,* at pp. 92–93) is founded on the law's concern lest a conviction be based solely on an

untrue admission or confession induced by fear, coercion, or hope of leniency. 3 Wigmore, *Evidence* (3d ed. 1940), §§ 821, 822; 7 *id.*, § 2071; 2 Wharton, *Criminal Evidence* (12th ed. 1955), §§ 393–394, 372–383; *Bram* v. *United States*, 168 U.S. 532, 562–564; *Wilson* v. *United States*, 162 U.S. 613, 622–623; *Opper* v. *United States*, *supra*, at pp. 89–90; *Smith* v. *United States*, 348 U.S. 147, 153. Petitioner's "admissions" were of an entirely different kind; they were made prior to arrest and to private individuals, rather than to law-enforcement authorities.

Moreover, in any event, petitioner's admissions were amply corroborated by the extensive evidence of his activities as a Party member (see, *supra*, pp. 5–7; Pet. App. A, pp. 48–53).

(*c*) Petitioner argues (Pet. 18–19) that his false statements were not shown to be material in the absence of evidence that his union actually utilized the facilities of the National Labor Relations Board after it was placed in compliance by the latter as a result of its filing of the required documents (including petitioner's affidavits). As the court below pointed out (Pet. App. A, p. 57), however, "[t]he materiality of the false statement is tested not by the union's use of the N.L.R.B.'s facilities but by the Union's achievement thereby of a status which carries with it the right to invoke the benefits of the National Labor Relations Act." This status, once achieved by the filing of the required affidavits, is irrevocable, even if some or all of the affidavits later prove to be false. *Leedom* v. *International Union of Mine, Mill & Smelter Workers*,

352 U.S. 145; *Amalgamated Meat Cutters & Bucher Workmen of North America* v. *National Labor Relations Board*, 352 U.S. 153. "The test is not use but right to use." *Sells* v. *United States*, 262 F. 2d 815, 819 (C.A. 10), certiorari denied, 360 U.S. 913.

(*d*) As to petitioner's general attack upon the sufficiency of the proof (Pet. 14–18), we submit that the jury was fully justified in finding, on the basis of uncontradicted evidence reviewed at length by the court below (Pet. App. A, pp. 48–57), that petitioner's pre-1949 membership in the Party was not terminated by his purported resignation. In light of the careful review of the evidence reflected in the opinion below, there would certainly appear to be no occasion for a second review of the record in this Court.

3. Petitioner urges (Pet. 33–40) that prosecution evidence was erroneously received and that his cross-examination of prosecution witnesses was improperly restricted.

(*a*) It is argued (Pet. 33–35) that government witness Eckert was improperly permitted to testify that, during his membership in the Communist Party from 1931 to 1948, "[t]he policy of the Party" was that "once having joined * * * [it] you could not leave without being expelled" (R. 196). The Court of Appeals correctly held that the evidence "was probative of the second side of the question of membership, *i.e.*, whether the Party was willing to accept the defendant and recognize him as a member (Pet. 34)." Since acceptance of membership by the organization is an "essential element of membership in an organized

group" (*Jencks* v. *United States*, 353 U.S. 657, 679 (concurring opinion of Mr. Justice Burton)), the evidence was properly admitted.[8] The jury, whether or not it believed Eckert, was, of course, free to find, if it chose, that petitioner, from his side, had severed the connection with the Party.

(*b*) Petitioner also argues (Pet. 35–40) that the trial court improperly restricted his cross-examination of prosecution witnesses: first, that it was error for the trial court to terminate a line of inquiry which, in petitioner's view, tended to show that witness Mason had become an informant for the FBI and was testifying against him because he (Mason) feared denaturalization and deportation; secondly, that the trial court erred in refusing to permit petitioner to cross-examine witnesses Eckert and Gardner concerning alleged rivalries between the labor organizations by whom they were employed and Mine-Mill, petitioner's union. We believe that in both instances the trial court properly exercised its discretion.

The extent of cross-examination upon collateral matters is a matter peculiarly within the sound discretion of the trial court. *Glasser* v. *United States*, 315 U.S. 60, 83; *Alford* v. *United States*, 282 U.S. 687, 694. The facts and circumstances surrounding the rulings of the trial court are set forth in detail in the opinion below (Pet. App. A, pp. 61–

[8] The opinion below sets forth in detail evidence from which the jury could reasonably have inferred that petitioner had knowledge of the Party's policy against resignations (Pet. App. A, pp. 58–60). See, also, R. 126–130, 132, 590, 612.

62, 64–65) and we shall deal with them only briefly here.

As the Court of Appeals pointed out (Pet. App. A, p. 64), "[t]he inference that the witness Mason was coercively influenced to testify by a power over him held by immigration officials requires imagination to be applied in disparagement of facts appearing in the record." The evidence and offer of proof made by the defense tended to indicate not only that Mason could not have been denaturalized, but that there was hardly a reasonable basis for fear on Mason's part that the Government might conceivably seek to effect his denaturalization. It affirmatively appeared that Mason had not concealed his past membership in the Communist Party (see R. 936–939), that he did not procure his naturalization by fraud, and that consequently he could neither be denaturalized nor deported.[9]

The trial court's refusal to permit petitioner to cross-examine Eckert and Gardner concerning alleged rivalries between their unions and Mine-Mill, on the ground that the inquiry was too remote and would lead to a needless protraction of the trial in relation to a collateral matter (R. 815–816), was also a proper exercise of judicial discretion. The significant con-

[9] The Immigration and Nationality Act provides for the denaturalization of naturalized citizens only (so far as is here pertinent) where the naturalization certificate has been procured by fraud (8 U.S.C. 1451); the 1950 provision making past membership in the Communist Party a ground for deportation applies exclusively to aliens (8 U.S.C. 1251(a)(6)(C)(i); see *Galvan* v. *Press*, 347 U.S. 522).

sideration is that organizational rivalry, even if established, would fall far short of a showing of personal hostility, revealing bias or partiality.

4. Petitioner claims that the trial court improperly applied 18 U.S.C. 3500 (the "Jencks Act") in ruling on his requests for production of pre-trial statements of the three government witnesses (Pet. 30–33).

Statements made by the witnesses to agents of the F.B.I. were made fully available to the defense (following excision by the court of irrelevant portions).[10] Error is claimed, however, because the United States Attorney took the position, when the defense suggested that there might be other types of statements in existence, *i.e.*, statements made to government attorneys or to Congressional investigators, that such persons would not be "agent[s] of the Government" within the meaning of 18 U.S.C. 3500. An argument that this view was erroneous does not establish that petitioner was prejudiced.

In the first place, the United States Attorney also advised the court that the United States possessed no statements made to attorneys (R. 202), and that the Executive Branch had no statements (if any

[10] Petitioner argues (Pet. 30) that the trial judge erroneously ruled that the prosecution, rather than the court, should determine whether a writing is a "statement" within the definition appearing in 18 U.S.C. 3500(e). But the court's comments on this point were made in the context of a determination that it would turn over to the defense all of the statements tendered by the Government even if the Government's tender of F.B.I. material was broader (as, indeed, it was) than the statute required. See R. 636–641.

existed) which might have been made to Congressional personnel (R. 201).

In the second place, the court did not subscribe to the United States Attorney's legal argument or let the matter rest there (see R. 319–331). The trial judge permitted defense counsel (outside the presence of the jury) to question the witnesses sought to be impeached in order to determine whether there might be pre-trial statements other than the F.B.I. statements which had been produced. As pointed out in the opinion of the Court of Appeals (Pet. App. A, p. 73):

> * * * the record shows merely that the three witnesses, Eckert, Mason, and Gardner, had talked with government attorneys in preparation for this case and that Eckert had talked to an investigator for a congressional committee. The subject of these conversations was Travis and Mine-Mill, but there is nothing in the record to indicate that these witnesses had in these instances written, signed, adopted or approved any writing or that any recording was made of any oral statement made to these agents. It is presumed that these agents took notes or made summaries of their conversations with the witnesses but such interpretations would not be "statements which could properly be called the witness' own words," *Palermo* v. *United States*, and the witnesses denied signing or adopting any such statements.

If petitioner had wished to pursue the matter still further, he might have done so by calling the persons

who had interviewed the witnesses. He did not choose to do so.

In these circumstances, we submit that there is no showing of prejudice and no basis for believing that petitioner did not receive all pre-trial statements.[11]

5. Petitioner contends (Pet. 20–25) that the trial court erred in its instructions to the jury on the issues of membership in and affiliation with the Communist Party and in refusing the charge requested by petitioner on these issues.

(*a*) The first argument (Pet. 20–23) is that the membership instruction—insofar as it allowed the jury to consider 11 of the 14 enumerated criteria of membership set forth in Section 5 of the Communist Control Act of 1954 (50 U.S.C., 1952 ed., Supp. V, 844)—was objectionable on constitutional grounds because it permitted a finding of guilt on the basis of vague and indefinite standards. We submit that the eleven items listed by the trial court, though not determinative, were plainly relevant considerations which any jury would have to consider in resolving the ultimate factual issue before them, *i.e.*, whether petitioner was or was not a member of the Communist Party on the critical

[11] Petitioner's further suggestion that the Jencks Act could not properly be applied at his trial because he was indicted prior to its adoption is obviously untenable in the face of this Court's disposition of *Palermo* v. *United States*, 360 U.S. 343, and *Rosenberg* v. *United States*, 360 U.S. 367.

dates.[12] We point out, moreover, that the judge made clear that these were not the only indicia of membership; that the jury would have to weigh all of the relevant evidence; and that the Government's proof was required to be proof beyond a reasonable doubt (R. 1228–1230).

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[12] The pertinent portion of the instruction is as follows (R. 1229):

"In determining whether or not the defendant was a member of the Communist Party at the times alleged in the indictment, you may take into consideration whether the defendant: 1. Has made himself subject to the discipline of the Communist Party in any form whatsoever; 2. Has executed orders, plans, or directives of any kind of the Communist Party; 3. Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party; 4. Has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the organization; 5. Has been accepted to his knowledge as an officer or member of the Communist Party or as one to be called upon for services by other officers or members of the organization; 6. Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the Communist Party; 7. Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization; 8. Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization; 9. Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the Communist Party or to anyone else in behalf of the objectives of the organization; 10. Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization; 11. Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization."

(*b*) The trial court's instructions on the meaning of "membership" and "affiliation" (R. 1228–1230) are set forth verbatim in the opinion of the court below (Pet. App. A, pp. 66–68, n. 13). As the Court of Appeals stated (Pet. App. A, p. 68), they were "meaningful and clear" and fully in accord with previous pronouncements of this Court and other federal appellate courts. See *Jencks* v. *United States*, 353 U.S. 657, 679–680 (concurring opinion); *Galvan* v. *Press*, 347 U.S. 522, 528–529; *Bridges* v. *Wixon*, 326 U.S. 135, 142–144; *Lohman* v. *United States*, 251 F. 2d 951, 953–954 (C.A. 6); *Fisher* v. *United States*, 231 F. 2d 99, 106–108, 107, n. 2 (C.A. 9). See, also, *Travis* v. *United States*, 247 F. 2d 130, 135–136 (C.A. 10) (Pet. App. B, pp. 85–87).

6. We turn finally to petitioner's contention that the grand jury testimony of the three government witnesses should have been made available to the defense or inspected by the court (Pet. 26–30).

Petitioner urges, in this connection, that there was an adequate showing of need for production or inspection because there were variations between the trial testimony of the government witnesses and statements or testimony given by those witnesses on various other occasions. There were, to be sure, variations—human memory is rarely a perfect instrument—but we dispute the suggestion that the variations were significant, that they were material, or

that they were of a kind other than that which one would normally expect in the case of a witness seeking to recall details. We rely upon the appraisal of the Court of Appeals, which has examined the testimony in full and in context (Pet. App. A, p. 75):

> * * * In view of prior statements of these witnesses made available to the defense, in which there appeared no suggestion of material inconsistency, it is unlikely that their statements to the grand jury occurring at a time between the giving of such statements and consistent statements upon trial would produce impeaching material. Appellant shows inaccuracies in the testimony of the witnesses (i.e. Gardner thought he had testified in another case the prior week but actually it was two weeks earlier; Eckert had testified on seven previous occasions against Mine-Mill but his testimony as to details was not precisely the same on each occasion; Gardner's evidence at trial was not shown on the reports which he made to the F.B.I.; Mason stated to the F.B.I. that he was "unable to enlarge" on information about appellant, but at trial gave other specific information); these inaccuracies might well give rise to argument concerning the witnesses' memories and powers of observation which were available to the defense from the materials produced by the government. They do not demonstrate a reason for believing that the witnesses' testimony was biased or impeachable on material. They

do not compel the conclusion that the testimony before the grand jury requires further investigation.

Petitioner also contends that rulings of the District Court impeded his efforts to ascertain from the Government's witnesses how they had testified in the course of grand jury proceedings. Thus, the petition states (pp. 26–27): "When the defense asked the witnesses whether they had testified before the grand juries about the episodes to which they had testified on direct examination and even whether they had testified about petitioner before the grand juries at all, the trial judge sustained the objections of the government (R. 540, 698–701, 704, 873–74)." But it appears that in the instances cited by petitioner objections were sustained because the trial court concluded that the questions were improper in form, scope or purpose. There is no need to debate the correctness of the particular rulings. A complete answer to petitioner's claim is that at numerous other points in the record (to which petitioner has not referred) petitioner did ask each of the Government's witnesses whether they had testified before grand juries in relation to Travis and that the questions were allowed and were answered by each of those witnesses. See the excerpts set forth in the Appendix, *infra*, pp. 26–33. In no instance did petitioner seek to go further and to ask the witnesses concerned whether there was inconsistency as between their trial testimony and their grand jury testimony. See R. 249, 251, 383, 397, 399, 469, 657, 811, 876, 962, 964–965. Accord-

ingly, petitioner has no sound basis for claiming that restrictive rulings as to permissible cross-examination impaired his opportunity to show a particularized need for grand jury inspection.[13]

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[13] We do not agree with petitioner that the Second Circuit has adopted the view that inspection of grand jury minutes by the trial judge is mandatory whenever the defense requests it. Assuredly, there is some measure of discretion. One of the most recent pronouncements of the Second Circuit states (*McKeever* v. *United States*, November 10, 1959): "In this Circuit the procedure whereby grand jury testimony may be made available to the defense is well established. After a government witness has testified on direct examination, if there appears to be some basis for supposing that his grand jury testimony may be at variance with his trial testimony, the defense may ask the trial judge to examine the witness' grand jury testimony. If the trial judge finds any material discrepancy between the trial testimony and the grand jury testimony, such part of the minutes is made available to the defendant." The reference to "some basis for supposing" obviously means something more than a bare theoretical possibility of variance (which would always exist in the case of every witness who had previously testified before the grand jury); it indicates that in each instance a judgment based upon the informed discretion of the trial judge must be made. The view of the court below is consistent with the Second Circuit's approach. It has concluded that, in light of all of the relevant circumstances (including the availability to the defense of a mass of material consisting both of extra judicial statements and transcripts of testimony given in other proceedings; see, *e.g.*, R. 212–213, 656, 665, 872–873, 892), there was no basis for supposing variance in the grand jury testimony or for holding that the District Court had abused its discretion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

We acquiesce in petitioner's suggestion (Pet. 45) that the Court defer action on the petition in this case, as well as on the petition in No. 945, October Term, 1958, until the courts below have finally acted on petitioner's second motion for a new trial grounded on newly discovered evidence.

Respectfully submitted.

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DECEMBER 1959.

APPENDIX

Excerpts From Testimony of Government Witnesses on Cross-Examination Concerning Their Testimony Before Grand Juries

Kenneth Eckert:

R. 248–249 [In Open Court]:

Q. Mr. Eckert, you have testified before with respect to Mr. Travis and Mine-Mill, haven't you?—A. Yes.

Q. Would you tell us what those occasions have been if there has been more than one occasion?—A. Is that Travis and Mine-Mill or just Mr. Travis?

Q. Travis and Mine-Mill.—A. Well, I have testified in proceedings involving the Mine, Mill & Smelter Workers in the trial of Mine, Mill & Smelter Workers by the CIO, in the Senate, United States Senate investigation of Mine, Mill & Smelter Workers, The McCarran hearing in Salt Lake City, the Jencks case in El Paso, Texas, Grand Jury of Ben Gold, and the subsequent trial of Ben Gold, the Grand Jury proceedings involving Maurice Travis in Denver, and the trial of Maurice Travis, the decompliance proceedings of the National Labor Relations Board against the Mine, Mill & Smelter Workers, the Security Activities Control Board hearings on Mine, Mill & Smelter Workers.

* * * * *

Q. Did you give testimony about Travis before a second Grand Jury in Denver at any time?

Mr. KELLEY. Just a moment. The Government objects to that as being immaterial and not proper cross-examination.

The COURT. I think he can answer the question. You may answer, Mr. Eckert.

A. I don't recall any other Grand Jury proceedings involving Travis here.

Q. Well, Mr. Eckert, you stated that you testified about Travis before one Grand Jury in Denver. Can you remember when that was?—A. To the best of my recollection that was either the last part of 1954 or early 1955.

Q. Didn't you return to Denver subsequently to make another appearance before another Grand Jury in the Federal District Court?—A. I don't recall any other Grand Jury proceedings in Denver other than that one.

Mr. WITT. I am sorry, your Honor. This answer surprises me a little.

R. 251 [In Open Court]:

Q. You have already testified that you gave testimony before the Grand Jury in this court which indicted Travis. Do you recall when that was?—A. To the best of my recollection that was either the latter part of 1954 or early in 1955.

R. 382–383 [In Chambers]:

Mr. WITT. Your Honor, there is one matter relating to the witness's testimony on cross-examination yesterday that I think I have to clear up before I go into this line, and that relates to his answer on cross-examination yesterday as to whether or not he testified before the Grand Jury in this Court which handed down the indictment in the so-called Pezzati case which is now pending before your Honor on the motion to dismiss. The witness testified yesterday afternoon, as I recall, that although he testified before

the Grand Jury which indicted Travis, and he said he thought that was either 1954 or 1955, he didn't recall testifying before a subsequent Grand Jury. Now, I have the witness's testimony here before the SACB on March 29, 1957, where I cross-examined him about this matter. We could not find this reference——

The COURT. I might ask him again, if you have any doubt about it, if he testified before any subsequent Grand Jury here.

Q. I will ask you, Mr. Eckert, did you testify a second time in this Court before a Grand Jury after you testified in the Travis matter?—A. Yes; I subsequently recall that I have been here before the Grand Jury.

Q. And when was that, Mr. Eckert?—A. That was either 1956 or 1957 to the best of my recollection.

Mr. WITT. This one matter, since the witness's testimony yesterday was before the Jury, we will return to it when we go before the Jury to get the record straight before the Jury.

The COURT. All right.

R. 396–397 [In Chambers]:

Q. Now, Mr. Eckert, you testified yesterday that you appeared before a Grand Jury in this court against Travis in 1954 or 1955. Is that actually your best recollection as to the time, Mr. Eckert?—A. Yes, it is.

R. 399 [In Open Court]:

Q. Mr. Eckert, I asked you yesterday afternoon whether you testified before a Grand Jury in this court a second time. That was after you testified that you had appeared before a Grand Jury against Travis in 1954 and 1955, and I think you said yesterday that you did not recall whether you appeared before a Grand Jury in this court a second time.

Based on the discussion in Chambers in which you participated this morning, Mr. Eckert, I want to ask you whether you now recall whether or not you appeared before a Grand Jury in this court a second time.—A. Yes, I do.

Q. And did you?—A. Yes.

R. 452 [In Chambers]:

The COURT. I don't know where we left off yesterday. Somebody probably has the transcript.

Mr. DEIKMAN. The transcript at page 659 indicates where we left off yesterday. I believe that the questions were in regard to the first appearance by the witness before the Grand Jury in connection with the Travis case in this court. I believe that the witness has stated that he did appear before that Grand Jury and that he talked to attorneys previous to his testimony before the Grand Jury.

Mr. WITT. Your Honor, in this connection we have been intending to get this clear: You will recall that the witness has testified that he did appear before that Grand Jury.

The COURT. He testified to that in open court after we went back in there. What I am interested in is not going back over any of this.

Mr. WITT. No. I was about to say in open court the witness testified that his best recollection is that he testified against Travis in 1954 and 1955. So that the record will be clear on this point to be sure there is no dispute about it the record in this case shows that Travis was indicted on October 28, 1954. May it be stipulated that the witness appeared before the Grand Jury in connection with Travis in 1954 before October 28?

Mr. KELLEY. If that is the date. I don't even remember.

Mr. WITT. That is the date of the indictment. It was the Thursday before election, you remember, Mr. Kelley. That is why I remember it so well.

Mr. KELLEY. I do remember. We will stipulate to that.

R. 469 [In Chambers]:

Q. Now, Mr. Eckert, I believe you testified that you testified before the Grand Jury on the second time in Denver?—A. Yes.

Q. Now, do you recall when that was?

The COURT. I think he fixed the time yesterday, didn't he?

Mr. WITT. Yes.

Mr. DEIKMAN. That was in 1956. Can we stipulate to that, Mr. Kelley?

Mr. KELLEY. Whatever the date is.

The COURT. That was testified in open court. Mr. Witt asked him before the Jury, and he testified, if my memory is good, didn't you?

Mr. WITT. Yes; I think he said '56.

FRED GARDNER:

R. 656–657 [In Open Court]:

Q. Will you tell us in which proceedings before this one you have testified?—A. I testified in the Cleveland conspiracy trial a couple of weeks ago. I testified before grand juries in Denver, Cleveland, and New York.

Q. Will you give us the dates when you testified before the grand juries taking them one by one?—A. Well, I testified in Denver I believe it was in the summer of '56. I don't recall just what month that was. I testified in Cleveland before the grand jury about January of '57. I testified in Denver in the summer of '57—no; I think that would be the summer of '56 in Denver, and——

Q. I am sorry. That is what you said before.—A. It occurs to me I am a little confused as to these dates, but I think that was the summer of '56.

Q. When you say "that" what was that?—A. The Denver Grand Jury.

R. 811 [In Chambers]:

Q. Now, you also testified that you appeared before the Denver Grand Jury in the summer of 1956, the Cleveland Grand Jury in January of 1957, and the New York Grand Jury in December, 1956 or around that time. Were there any other grand juries in which the subject of inquiry was a violation of the Taft-Hartley Act, the Smith Act or any other act of that kind before which you appeared?—A. No, sir.

WILLIAM MASON:

R. 875-876 [In Open Court]:

Q. Mr. Mason, did you testify before a grand jury in this court in 1954?—A. Yes.

Q. Mr. Mason, did you testify before a grand jury in this court in 1956?—A. I don't understand the question as it relates to "court".

Q. In this courthouse, in this building.—A. Yes.

Q. Mr. Mason, on these occasions when you testified, I am referring to all of them, the two Travis trials in this court and the two grand juries and your appearance before the NLRB in May, 1954, were you paid a per-diem and a witness fee?—A. I think I was paid a witness fee.

Q. And were you paid a per diem?

The COURT. What do you mean by that?

Mr. WITT. I am sorry, Your Honor. I intended to say mileage and a witness fee.

Q. I am asking you now, Mr. Mason, whether you received mileage and witness fees in connection with these appearances as a witness.—A. Yes.

Q. And in connection with any of the appearances did you receive so-called expert witness fee?—A. No.

R. 962 [In Chambers]:

Q. Mr. Mason, I think you testified in open court that you appeared before the grand jury here in 1954 before Travis was indicted, is that right?—A. I don't recall whether I answered it or whether there was an objection from the Government attorneys, but I did testify before the grand jury.

R. 963 [In Chambers]:

Q. Did you have occasion, Mr. Mason, to appear before a grand jury in Denver in 1956?—A. Yes.

R. 966 [In Chambers]:

Q. Have you had occasion to appear before any other grand juries besides the ones that we have already mentioned and about which you have testified which grand juries elicited your testimony in regard to any violations similar to the Taft-Hartley Act, Smith Act, or anything in that area?

Mr. KELLEY. The Government objects to that as incompetent going into what was considered before a grand jury, any grand jury. If he wants to ask if he attended, went to some place for the purpose of giving testimony, that is one thing, but asking him if he testified before a grand jury as to a certain matter is improper.

The COURT. I am inclined to think that's right, but I think what Mr. Deikman's question was was before any grand jury in which that matter was involved, and that was with respect to what he testified to.

Mr. KELLEY. If he goes into Smith Act and so forth, that is irrelevant too.

The COURT. Let's find out what the fact is, whether he testified before any other grand juries that were investigating any of these matters, not with respect to what his testimony was. Did you appear before any other grand jury that involved any of these matters?

The WITNESS. Besides the two?

The COURT. Besides the two here in Denver.

The WITNESS. No.

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IN THE

Supreme Court of the United States

October Term, 1959

No. 1010

MAURICE E. TRAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO GOVERNMENT'S OPPOSITION

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REPLY TO GOVERNMENT'S OPPOSITION

We deal with the issues in the same order as they are presented in the government's opposition.

1. The Question of Venue (Opp., pp. 8-11)

The government acknowledges that the decision of the court below that venue was properly laid in the District of Colorado is in conflict with the decision of the Third Circuit in *United States* v. *Valenti*, 207 F. 2d 242, also a Section 9(h) case, in which it was held that venue is proper only at the place where the affidavit is received by the Labor Board. However, the opposition contends (pp. 10-11) that the reasoning of *Valenti* will not apply to the reporting provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (Pet., p. 44, n. 35). The argument is that the conclusion in *Valenti* was based on the fact that filing under Taft-Hartley was voluntary while the reporting provisions of the new Act (Title II) are mandatory. The opposition concludes that even on the reasoning in *Valenti*, under the 1959 statute, there is

"a breach of statutory duty as soon as the reporting party engages in the initial act of making a false report" (p. 11).

There is nothing in *Valenti*, or in any other case, that supports the conclusion that where reporting or filing is mandatory, the crime of filing a false report is committed when the false report is made. Even under the continuing offense statute, 18 U. S. C. 3237, on which the government relies in this case, it has never been held that the crime of filing a false report or statement is committed when the false report or statement is made. The report or statement must be filed with the agency of the government before there is a crime in any district.

In any event, the government's position is contradicted by the tax fraud cases which we cite in the petition (p. 41): *Bowles* v. *United States*, 73 F. 2d 772 (C. C. A. 4), cert. denied, 294 U. S. 710; *Wampler* v. *Snyder*, 66 F. 2d 195 (C. A. D. C.). Cf. *United States* v. *Lombardo*, 241 U. S. 73; *Johnston, et al.* v. *United States*, 351 U. S. 215.

2. The Insufficiency of the Evidence (Opp., pp. 11-14)

(a) The opposition (p. 11) asserts that "the decisions uniformly hold" that the perjury rule of evidence is inapplicable to prosecutions under the "false statement" statute.

It is true that, aside from the court below,[1] three other Courts of Appeal have held that the perjury rule does not apply in prosecutions such as these. But all three cases were reversed on other grounds. *United States* v. *Killian*, 246 F. 2d 77, 246 F. 2d 82 (C. A. 7); *Gold* v. *United*

[1] Among the cases cited in the opposition is *Sells* v *United States*, 262 F. 2d 815, cert. denied, 360 U. S. 913, a decision in the court below which it followed in the opinion affirming petitioner's conviction. The denial of certiorari in the *Sells* case is not very meaningful because, as the government pointed out in its opposition to the petition in that case (p. 13), Sells had not raised the issue at the trial.

States, 237 F. 2d 764 (C. A. D. C.), 352 U. S. 985; *Fisher* v. *United States*, 231 F. 2d 99 (C. A. 9). Furthermore, as we said in the petition (p. 14), the opinion in the *Fisher* case calls the question "a close one", 231 F. 2d at 106, and Judge Murrah in this case and Judge Bazelon in the *Gold* case were of the opinion that the perjury rule does apply.

By its grant of certiorari on the issue in *Gold*, 352 U. S. 819, this Court indicated in 1956 that the question should be resolved. Since that time, the issue has continued to be mooted in the lower courts.[2] It still merits resolution by this Court.

(b) The government argues (pp. 12-13) that the rule that extra-judicial admissions of the accused made after the alleged commission of the offense require corroboration applies only to admissions made to law-enforcement authorities and not to admissions made to private individuals, as in this case. That this may be the rule is suggested by *Smith* v. *United States*, 348 U. S. 147, but the opinion in *Opper* v. *United States*, 348 U. S. 84, indicates no such limitation. See *Bryson* v. *United States*, 238 F. 2d 657, 662 (C. A. 9). In any event, there is apparently no lower court decision explicitly supporting the government's contention, while there are decisions applying the corroboration rule

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[2] Insofar as we are aware, the matter has been raised in three other recent cases. Killian's second conviction was recently affirmed, *United States* v. *Killian*, 275 F. 2d 561 (C. A. 7). Although the opinion makes no reference to the issue, it was presented in appellant's brief. We are informed that a petition for rehearing has been denied by the Court of Appeals and that a petition for writ of certiorari will be filed on or before June 12. Similarly, the issue was presented in appellant's brief in *United States* v. *West, et al.*, 274 F. 2d 885 (C. A. 6), but was not referred to in the opinion. We are also informed that a petition for rehearing has been denied and that a petition for writ of certiorari will be filed on or before May 20. The issue was also raised on the trial in *Pezzati et al.* v. *United States*, pending in the Court of Appeals for the Tenth Circuit, No. , on an appeal from a conviction, like that in the *West* case, for conspiracy to file false non-Communist affidavits under Taft-Hartley.

to cases of admissions to private persons. *United States* v. *Carminati*, 247 F. 2d 640, 644 (C. A. 2), cert. denied, 355 U. S. 883; *United States* v. *Nystrom & Kennedy*, 237 F. 2d 218, 225 (C. A. 3).

In this case, Mason and Gardner testified, on the trial in January, 1958, as to alleged post-affidavit admissions made by petitioner in conversations with one or the other of them during a period from March, 1952, to August, 1953 (Pet., pp. 7-8, 14-15). Testimony of oral admissions is suspect in any event, *Sandez* v. *United States*, 239 F. 2d 239, 250 (C. A. 9), but here, in addition, the testimony related to times in the fairly remote past. Furthermore, the alleged admissions were circumstantial, not direct. This, then, is a case to which the corroboration rule would seem to be peculiarly applicable.

(c) In fact, the fundamental weakness in the proof in this case is that it consists *entirely* of petitioner's admissions. *There is not a shred of evidence of the corpus delicti.* It is not merely that there is no evidence to corroborate petitioner's admissions that it was he who committed a crime. There is no evidence that a crime was even committed. And a conviction can not be had on a confession or an admission in the absence of any evidence that there was a crime in the first place.[3]

This gaping hole in the proof may explain why the opposition finds it necessary to assert that "petitioner's admissions were amply corroborated by the extensive evidence of his activities as a Party member" (p. 13). As the record citations in support of this assertion indicate, it is based on the testimony of Eckert, the only witness aside from Mason and Gardner. But Eckert's testimony

[3] "The proof of every crime consists of: (1) proof that the crime charged has been committed by someone; and (2) proof that the defendant is the perpetrator of the crime." 2 Wharton, *Criminal Evidence* (12th ed. 1955), Sec. 393, pp. 130-131. Cf. *Kelly* v. *United States*, 246 F. 2d 864 (C. A. 10).

related to the period from 1942 to 1948, during which time petitioner was—as he conceded and offered to stipulate on the trial—a member of the Party (Pet., p. 5). It is impossible to comprehend how evidence that petitioner was a Party member from 1942 to 1948 corroborates admissions he is alleged to have made after the affidavits were filed in 1951 and 1952.

In his dissent in the court below, Judge Murrah observed that the evidence was "inconclusive" (Pet. App. A, p. 76). The fact is that, without evidence of the corpus delicti, the evidence is palpably insufficient.

3. The "Can't Resign" Testimony (Opp., pp. 14-15)

(a) The petition argues (pp. 33-35) that Eckert's testimony that during his membership in the Communist Party (which terminated in 1948), the policy of the Party was "that once having joined (it) you could not leave without being expelled", was improperly admitted. In rejecting this argument, the Court of Appeals said that the evidence "was probative of the second side of the question of membership, i.e., whether the Party was willing to accept the defendant and recognize him as a member. * * *" (Pet. App. A, p. 58).

The opposition argues that since "acceptance of membership by the organization is an 'essential element of membership in an organized group' (*Jencks* v. *United States*, 353 U. S. 657, 679 (concurring opinion of Mr. Justice Burton)), the evidence was properly admitted" on the ground given by the Court of Appeals (pp. 14-15). "The jury, whether or not it believed Eckert, was, of course, free to find, if it chose", the opposition says, "that petitioner, from his side, had severed the connection with the Party" (p. 15).

In the first place, what Mr. Justice Burton called "the essential element of membership in an organized group" included "the desire of an individual to belong to an or-

ganization" as well as "a recognition by the organization that it considers him as a member." 353 U. S. 657, 679. It is therefore difficult to understand what the government means when it says that the jury, whether or not it believed Eckert, was free to find that petitioner, "from his side," had severed his connection with the Party.

Apart, however, from this apparent *non sequitur*, the jury was not properly instructed on this matter and therefore, if it believed Eckert, must have taken his testimony to be probative of both sides of the question of membership. Thus, the trial court refused to charge that petitioner could not be convicted unless the jury found that he believed himself to be a member of the Party when he executed the affidavits (Supp. R. 8) or that Eckert's testimony about the "can't resign" policy should not be considered unless the other evidence showed it to have been the policy in August, 1949, when petitioner resigned, that petitioner knew of it, and that he had accepted, approved, or adopted it (Supp. R. 2). By the refusal of these requests, the jury was left free to find that Eckert's "can't resign" testimony was, without more, probative of petitioner's desire to belong to the Party as well as of the Party's acceptance of him.

b) The opposition relies also on the recital in the opinion of the court below (Pet. App. A, pp. 58-60) of evidence "from which the jury could reasonably have inferred that petitioner had knowledge of the Party's policy against resignations" (p. 15, n. 8).

In the first place, even if there were such evidence, the refusal of the trial court to give the requested instructions permitted the jury to find that petitioner desired to belong to the Party solely on the basis of Eckert's "can't resign" testimony.

In the second place, the evidence of the four episodes which the court below reviewed in this connection (Pet.

App. A, pp. 58-60) does not justify the inference that petitioner had knowledge of the "can't resign" policy. At the meeting in New York in 1948, it was decided that Communists in the trade unions would not file the non-Communist affidavits. The question of resignation from the Party was therefore irrelevant and was not discussed. In the June, 1949 conversation with Mason, all that petitioner said was that consideration was being given to signing the affidavits. In the July, 1949 conversation, petitioner showed Mason a copy of his resignation statement and said that the Party had approved it. Thus, this is evidence that, at least in this instance, the Party approved a policy of resignation rather than the opposite. Finally, Gardner's testimony about his conversation with petitioner in October, 1951, though somewhat ambiguous, shows petitioner to be complaining that "the enemies of the Party" were attacking his resignation as not being bona fide.

c) The court below acknowledged that the Eckert testimony "could show nothing of the state of mind of the defendant" (Pet. App. A, p. 58). However, said the court, "the evidence of the Party's policy was relevant in the interpretation of the defendant's statements and behavior" (*ib.*, p. 60).

The difficulty with this conclusion is that the jury was not so instructed. By the refusal of the trial court to give the instructions requested by petitioner, the jury was left free to infer that Eckert's testimony was alone sufficient to show "the state of mind of the defendant." Furthermore, it is reasoning in a circle to say that although the Eckert testimony "could show nothing of the state of mind of the defendant", the testimony "was relevant in the interpretation of the defendant's statements and behavior". Even if the other evidence did show that petitioner knew of such a policy, the Eckert testimony was inadmissible on that issue. In any case, the refusal of the trial court to instruct the jury as requested allowed the jury to infer knowledge only from the Eckert testimony.

4. The Application of Section 3500 (Opp., pp. 17-19).

The government argues (pp. 17-19) that petitioner was not prejudiced because of the erroneous position of the prosecutor on the trial that government attorneys and Congressional investigators are not "agent(s) of the Government" within the meaning of Section 3500 and that therefore "statements", as defined in subsection (e), to such persons are not producible to the defense.

"In the first place", says the opposition, "the United States Attorney also advised the court that the United States possessed no statements made to attorneys (R. 202), and that the Executive Branch had no statements (if any existed) which might have been made to Congressional personnel (R. 201)" (pp. 17-18).

These references to the record are incomplete and misleading. With respect to statements made to attorneys, it is true that at the point cited by the government, the United States Attorney remarked that "there is no such report" and that "there isn't any such statement" (R. 202). But these remarks were addressed to the contention which had just been made by defense counsel that if there were "statements" made to the United States Attorney or his own staff, they were producible. Even in this connection, it appears that the United States Attorney was defining "statement" to exclude what he called "work product", as the colloquy at this point in the record makes clear (R. 200-211). In any event, during the course of this same colloquy, the United States Attorney made it quite explicit that, in view of his position that Section 3500 does not apply to statements to attorneys, he had made no effort to determine whether there were "statements" made to government attorneys elsewhere than in his office. Thus, he stated that "I wouldn't know what other U. S. Attorneys might have, Mr. Deikman" (R. 204); that he "would have no knowledge" whether there were statements in El Paso and "other places" where the witness, Eckert, had

testified (R. 205); and that he had made no effort to determine what was available as a result of interviews with the witness by government attorneys elsewhere (R. 208-209).

Eckert and the other two witnesses had had a great number of interviews over the years about the subject matter of their direct testimony in this case with government attorneys in Washington, El Paso, Denver and other places, in connection with their appearances in administrative proceedings, trials, and before grand juries (R. 383-98, 453-71, 508-20, 811-12, 833-44, 956-66, 983-85). If, as a result of these interviews, there were any "statements" in the possession of the government, they were not produced because the prosecution, as a consequence of its view that government attorneys are not "agent(s)" of the government, had made no effort to find out whether they existed.

With respect to statements to Congressional personnel, the record is even less free of doubt. It is true, as the opposition says (pp. 18-19), that the United States Attorney advised the court that "the Executive Branch had no statements (if any existed) which might have been made to Congressional personnel (R. 201)". But this reference to the record neglects to say that the United States Attorney had no such statements because, as in the case of attorneys, he took the position that "those are not encompassed within the purview of 3500 * * *" (R. 201). He reiterated this position at other points in the record when the defense was eliciting testimony from Eckert that he had been interviewed by an agent of a Senate subcommittee and requested that any "statements" in that connection relating to the subject matter be produced (R. 315, 523-24). The United States Attorney had no such statements because he had made no effort to discover whether any existed.

In any event, argues the government, the defense was not prejudiced because the trial judge permitted defense counsel, outside the presence of the jury, to question the witnesses to determine "whether there might be pre-trial

statements other than the F.B.I. statements which had been produced" (p. 18). Such interrogation, says the government (pp. 18-19), failed to disclose that there were any such statements, and besides, the defense could have pursued the matter by calling the persons who had interviewed the witnesses.

But this argument, by its very nature, assumes that in the case of government attorneys and Congressional personnel, the procedure under Section 3500 is different than in the case of F.B.I. agents. In the case of the latter, the government is required to produce any "statements" in its possession. But in the case of attorneys and Congressional investigators, according to the government, it becomes the responsibility of the defense to prove that there are "statements" in existence.

If attorneys and Congressional personnel are "agents" —as the government now apparently concedes—then the procedure under Section 3500 with respect to production of "statements" made to them is of course the same as in the case of "statements" made to F.B.I. agents. On the trial, the defense was whipsawed between the contention of the prosecution that attorneys and Congressional investigators are not "agents", on the one hand, and the insistence of the trial judge that the defense first prove that there were in existence "statements" made to such persons, on the other (R. 527). Such a procedure violated Section 3500. *Palermo v. United States*, 360 U. S. 343, 354; Pet. 30-32.

5. The Instructions on "Membership" and "Affiliation" (Opp., pp. 19-21)

a) The opposition contends that the 11 criteria of membership from Section 5 of the Communist Control Act of 1954 which the trial court listed in the charge to the jury "were plainly relevant considerations" for the jury to consider in deciding whether petitioner was a member of the Communist Party on the critical dates (p. 19).

This argument of the government's overlooks the fact that the charge to the jury omitted the two criteria from Section 5 which were most "plainly relevant". Of the 13 specific criteria set forth in Section 5, the two which were omitted are the first two—whether the accused has been listed to his knowledge as a member by the organization and whether he has paid dues or made any other financial contribution to the organization. It is apparent that the trial judge omitted these criteria because there was no evidence in the case that petitioner has been listed by the Communist Party as a member or that he had paid dues or made some other financial contribution to it. But, the omission of the two criteria from the charge deprived petitioner of his right to have the criteria applied by the jury to his benefit.

Such a one-way application of Section 5 is obviously untenable. It is a denial of trial by jury on the evidence (or lack of it) and a denial of due process. It restricts the jury to consideration only of evidence of guilt and takes away from the jury the opportunity to weigh evidence of innocence, or rather, in this case, the absence of evidence of guilt.

The first two criteria in Section 5 are those most "plainly relevant" to the question of membership. The failure of the trial judge to include them in his instruction was highly prejudicial.

b) Among the questions with respect to which the Court has granted certiorari in *Communist Party* v. *Subversive Activities Control Board*, 361 U. S. 951, now set for argument on October 10, 1960, is the question of the constitutionality of Section 5 (Petition of the Communist Party, p. 4). Inasmuch as the question is already before the Court, certiorari should be granted on the same issue in the instant case.

6. The Demand for Production or Inspection of the Grand Jury Testimony (Opp., pp. 21-24)

(a) The opposition (pp. 21-24) neglects to comment on the merits of the argument in the petition (pp. 29-30) that the question expressly reserved in *Pittsburgh Plate Glass*, 360 U. S. 395, 401, *i.e.*, whether a trial judge, upon request, is "absolutely required" to examine the grand jury testimony of prosecution witnesses for inconsistencies or contradictions with their trial testimony, should be answered in the affirmative. Since this case, unlike *Pittsburgh Plate Glass*, does present the issue, this Court should decide it.

The opposition does dispute the assertion in the petition (p. 29) that the Second Circuit has adopted the rule that inspection by the trial judge is mandatory. But it is impossible to read the pre-*Jencks* opinions in *United States* v. *H. J. K. Theatre Corp.*, 236 F. 2d 502, cert. denied *sub. nom, Rosenblum* v. *United States*, 352 U. S. 969, and *United States* v. *Alper*, 156 F. 2d 222, and the post-*Jencks* opinions in *United States* v. *Spangelet*, 258 F. 2d 338, *United States* v. *Zborowski*, 271 F. 2d 661, and *United States* v. *McKeever & Morrison*, 271 F. 2d 669, without concluding that this is now the settled rule in the Second Circuit.

There is no case in the Second Circuit that sustains the refusal of a trial judge to inspect grand jury testimony of a prosecution witness while, on the other hand, the Court recently reversed a conviction because of such a refusal. *United States* v. *Zborowski*, *supra*. Furthermore, that Court has urged prosecutors to make grand jury testimony available directly to the defense, *United States* v. *Spangelet*, *supra*, at 342, and has in fact pointed out that it is the duty of a prosecutor to call inconsistencies or contradictions to the attention of the trial judge, *ibid.*, or to the defense. *United States* v. *Zborowski*, *supra*, at 667-668; *United States* v. *McKeever & Morrison*, *supra*, at 672, n. 2.

(b) In any event, if the trial judge is to exercise discretion, how is it possible to do so where, as here, he rules that the defense must first show a contradiction between the trial and the grand jury testimony (which *Pittsburgh Plate Glass* declares is not required) and then forbids the defense from interrogating the witnesses as to the substance of their grand jury testimony? (Pet., pp. 26-27). Even so, the defense was able to show "a particularized need" justifying direct production (Pet., pp. 27-28), but if this is not so and if the trial court has discretion to make his own inspection, the discretion was clearly abused in this case.

(c) In answer to petitioner's argument that one of the reasons why the grand jury testimony of the witnesses should have been produced to the defense or inspected by the trial judge was that there were variations between the trial testimony of the witnesses and the pre-trial statements or testimony, the government disputes "the suggestion that the variations were significant, that they were material, or that they were of a kind other than that which one would normally expect in the case of a witness seeking to recall details" (Opp., pp. 21-22).

The government's description of the variations in the testimony of the witnesses is glaringly inappropriate. In Gardner's case, for example, his testimony on direct consisted only of two conversations with petitioner, but his statements to the F.B.I. about petitioner made no reference whatever to either conversation and he acknowledged on cross-examination that he had never told the F.B.I. about either of the episodes (Pet., p. 28; R. 864-66). Especially in view of the serious doubt cast on Gardner's credibility otherwise,[4] it would seem that this was clearly a case requiring an examination of his grand jury testimony by the defense or by the court, to determine whether

[4] *Travis* v. *United States*, Nos. 75 and 872, Oct. Term, 1959, involve two motions filed by petitioner for a new trial based on newly discovered evidence about Gardner.

Gardner had given any testimony at all to the grand jury about the two conversations.

Since the issue bore on *all* of Gardner's testimony incriminating petitioner, how can it now be argued that it was insignificant or immaterial? In fact, this would seem to be a classic case of "particularized need" justifying direct production to the defense. It was even more certainly a case requiring, at least, inspection by the trial judge. Yet production or inspection were both denied, even though the defense demand was explicitly restricted to the two episodes (R. 864-67) while, on the other hand, the only alternative avenue open to the defense of developing the matter for the jury was closed off by the ruling of the court that Gardner could not be cross-examined about the substance of his grand jury testimony against petitioner (R. 704).

(d) The government also claims that the trial court did not bar the defense from interrogating the witnesses about their grand jury testimony, but that in the instances cited by petitioner, "objections were sustained because the trial court concluded that the questions were improper in form, scope or purpose" (Opp., p. 23).

What the government says is simply not so. In the case of each of the three witnesses, petitioner sought to inquire into the substance of their grand jury testimony and in each case, on objection by the government, the inquiry was barred (*Eckert*: R. 540. *Gardner*: R. 698-701, 704. *Mason*: R. 873-74). If there is any doubt about the grounds of objection and the position of the trial judge, we direct attention particularly to the ruling sustaining the objection, on the ground of relevance, to the question to Gardner whether, when he appeared before the grand jury, he gave "any testimony about Travis" (R. 704); to the ruling, sustaining objections to similar questions to Mason (R. 873-74); and to the direction of the court, during the course of Mason's cross-examination, when the prosecutor again objected on the ground of relevance, that de-

fense counsel could ask the witness "if he testified before the grand jury without reference to the subject matter" (R. 874).

However, the government declares, there "is no need to debate the correctness" of these rulings because a "complete answer" to petitioner's claim that the trial court did not permit him to ask the witnesses how they had testified before the grand juries is that at numerous other points in the record where petitioner was allowed to ask the witnesses whether they had testified before grand juries about him, petitioner did not go further and ask the witnesses "whether there was inconsistency as between their trial testimony and their grand jury testimony" (Opp., p. 23).

This is no answer at all, let alone a "complete answer", because, at none of the points in the record cited by the government (R. 249, 251, 383, 397, 399, 469, 657, 811, 876, 962, 964-965),[5] was the defense dealing with the matter of inconsistency between the trial testimony of the witnesses and their grand jury testimony. Six of these instances—R. 397, 452, 469, 811, 962, 964-965—have no bearing at all on the issue. These instances occurred in chambers in the course of petitioner's examination of the witnesses to determine whether they had made "statements" to government attorneys under Section 3500. (See *supra*, Point 4, p. 9.) In these instances, the witnesses were asked merely whether they had given testimony to the grand juries about petitioner only as a foundation for asking them about their interviews with government attorneys prior to their grand jury appearances. There was therefore no occasion for asking them about the substance of their grand jury testimony and indeed such inquiry would have been obviously irrelevant to the purpose of the interrogation outside the presence of the jury. In every other instance cited by the

[5] The excerpts are set forth in the Appendix to the opposition, pp. 26-33, except that the Appendix, p. 29, includes an additional excerpt, R. 452, not cited in the body of the opposition, p. 23. Our discussion includes reference to this excerpt as well as to the others.

government, the record will show that the questions were either preliminary to the eventual questions about the substance of the grand jury testimony [6] or had a purpose at the particular time other than impeachment by the showing of inconsistent grand jury testimony. The fact is, as we have shown, that when petitioner finally did seek to elicit from each witness what testimony he had given about petitioner to the grand juries, in each case at a point in the record subsequent to those cited by the government, objections by the prosecution and rulings by the court barred the way.

(c) *Parr* v. *United States*, No. 391, Oct. Term, 1959, pending decision, also presents questions relating to the production of grand jury testimony of a prosecution witness. The instant petition, which presents all phases of the problem, should be considered by the Court at the same time.

CONCLUSION

For the reasons set forth in the petition and in this reply, the petition should be granted.

Respectfully submitted,

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[6] This is subject to one exception which is beside the point. In Mason's case, after the court had already barred interrogation about his grand jury testimony (R. 873-74), he was again asked about his grand jury testimony, but only as a foundation for asking whether he had received fees as a witness (R. 875-76).

SUPREME COURT OF THE UNITED STATES

No. 10.—October Term, 1960.

Maurice E. Travis, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[January 16, 1961.]

Mr. Justice Douglas delivered the opinion of the Court.

In this case petitioner was charged on four counts of an indictment with the making and filing of false non-Communist affidavits[2] required by § 9 (h) of the Taft-

[1] There are two companion cases, No. 3, *Travis* v. *United States*, and No. 71, *Travis* v. *United States*, in which we also granted certiorari and which present phases of the main case. We discuss them near the close of the opinion.

[2] This section, which was repealed by § 201 (d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525, provided:

"No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, *unless there is on file with the Board an affidavit* executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits." (Italics added.)

Section 35A of the Criminal Code was repealed by § 21 of the Act

Hartley Act, 61 Stat. 136, 146, as amended by Act of Oct. 22, 1951, § 1 (d), 65 Stat. 601, 602. The indictment charged that the affidavits were false writings or documents made and executed in Colorado and filed in Washington, D. C., with the National Labor Relations Board.

Petitioner was convicted and on appeal the judgment of conviction was reversed for a new trial. 247 F. 2d 130. Petitioner was tried a second time and again convicted. This time the judgment was affirmed on appeal, one judge dissenting. 269 F. 2d 928. The case is here on a writ of certiorari. 363 U. S. 801.

Before the first trial, petitioner moved to dismiss the indictment on the ground that venue was improperly laid in Colorado. The District Court denied the motion. Although the Court of Appeals reversed on another ground on petitioner's first appeal, it specifically approved the laying of venue in Colorado (247 F. 2d 130, 133–134) recognizing that its ruling was in conflict with that in *United States* v. *Valenti*, 207 F. 2d 242 (C. A. 3d Cir.). It is solely to this issue that we address ourselves.

It is agreed that the affidavits were executed by petitioner as a union officer in Colorado and mailed there to the Board in Washington, D. C., where they were received and filed.[3] The prosecution contends—and it was

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of June 25, 1948, 62 Stat. 683, 862, and is now covered, so far as we are now concerned, by 18 U. S. C. § 1001, which provides:

"Whoever, *in any matter within the jurisdiction of any department or agency of the United States* knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." (Italics added.)

[3] Under the regulations in force at the time of filing, petitioner's affidavit was required to be on file with the General Counsel of the National Labor Relations Board in Washington, D. C. 29 CFR § 101.3 (b) (since deleted, see 24 Fed. Reg. 7501 (Sept. 17, 1959)).

held below—that the offense was begun in Colorado and completed in the District of Columbia. In that view venue was properly laid in Colorado by virtue of 18 U. S. C. § 3237 (a) which provides:

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another . . . may be inquired of and prosecuted in any district in which such offense was begun . . . or completed."

We start with the provision of Art. III, § 2 of the Constitution that criminal trials "shall be held in the State where the said crimes shall have been committed," a safeguard reinforced by the command of the Sixth Amendment that the criminal trial shall be before an impartial jury of "the state and district wherein the crime shall have been committed." We start also with the assumption that Colorado, the residence of petitoner, might offer conveniences and advantages to him which a trial in the District of Columbia might lack. We are also aware that venue provisions in Acts of Congress should not be so freely construed as to give government the choice of "a tribunal favorable" to it. *United States* v. *Johnson*, 323 U. S. 273, 275. We therefore begin our inquiry from the premise that questions of venue are more than matters of mere procedure. "They raise deep issues of public policy in the light of which legislation must be construed." *United States* v. *Johnson, supra*, 276.

Where various duties are imposed, some to be performed at a distant place, others at home, the Court has allowed the prosecution to fix the former as the venue of trial. *Johnston* v. *United States*, 351 U. S. 215, 222. The use of agencies of interstate commerce enables Congress to place venue in any district where the particular agency was used. *Armour Packing Co.* v. *United States*, 209 U. S. 56. "The constitutional requirement is as to the

locality of the offense and not the personal presence of the offender." *Id.*, at 76. Where the language of the Act defining venue has been construed to mean that Congress created a continuing offense, it is held, for venue purposes, to have been committed wherever the wrongdoer roamed. *United States* v. *Cores*, 356 U. S. 405. And see *Brown* v. *Elliott*, 225 U. S. 392. The decisions are discrete, each looking to the nature of the crime charged. Thus, while the use of the mails might be thought to allow venue to be laid either at the sending or receiving end, the trial was recently restricted to the district of the sender, in light of the constitutional provisions already mentioned and the phrasing of a particular criminal statute. *United States* v. *Johnson*, *supra*, 277–278. Where Congress is not explicit, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States* v. *Anderson*, 328 U. S. 699, 703.

Section 9 (h) of the Taft-Hartley Act[4] with which we are concerned did not require union officers to file non-Communist affidavits. If it had, the whole process of filing, including the use of the mails, might logically be construed to constitute the offense. But this statutory design is different. It requires that the Board shall make no investigation nor issue any complaint in the matters described in § 9 (h) "unless there is on file with the Board" a non-Communist affidavit of each union officer. The filings are conditions precedent to a union's use of the Board's procedures. *Leedom* v. *International Union*, 352 U. S. 145, 148. The false statement statute,[5] under which the prosecution is brought, penalizes him who knowingly makes any "false" statement "in any matter within the jurisdiction of any department or agency of the United

[4] See note 2, *supra*.

[5] See 18 U. S. C. § 1001, note 2, *supra*.

States." There would seem to be no offense, unless petitioner completed the filing in the District of Columbia. The statute demanded that the affidavits be on file with the Board before it could extend help to the union; the forms prescribed by the Board required the filing in the District of Columbia; the indictment charged that petitioner filed the affidavits there. The words of the Act—"unless there is on file with the Board"—suggest to us that the filing must be completed before there is a "matter within the jurisdiction" of the Board within the meaning of false statement statute.[6] When § 9 (h) provides the criminal penalty,[7] it makes the penal provisions applicable "to such affidavits," *viz.*, to those "on file with the Board."

The Government admits that the filing is necessary to the "occurrence" of the offense, but, it argues, that the offense has its "beginning" in Colorado, because it was there that "the defendant had irrevocably set in motion and placed beyond his control the train of events which would normally result (and here did result) in the consummation of the offense." We do not agree with this analysis. Venue should not be made to depend on the chance use of the mails, when Congress has so carefully indicated the *locus* of the crime. After mailing, the affidavit might have been lost; petitioner himself might have recalled it.[8] Multiple venue in general requires crimes consisting of "distinct parts" or involving "a continuously moving act." *United States* v. *Lombardo*, 241 U. S. 73, 77. When a place is explicitly designated where a paper must be filed, a prosecution for failure to file lies only at that place. *Id.*, at 76–78. The theory of that

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[6] See 18 U. S. C. § 1001, note 2, *supra*.

[7] See note 2, *supra*.

[8] 39 CFR § 43.6 (a) provides: "Mail deposited in a post office may be recalled by the sender, by the parent or guardian of a minor child, or by the guardian of a person of unsound mind."

case was followed in *United States* v. *Valenti*, *supra*, where Judge Maris stated that no false statement has been made within the jurisdiction of the Board "until the affidavit through its filing has become the basis for action by the Board." *Id.*, at 244.

We think that is the correct view when 18 U. S. C. § 3237 is read in light of the constitutional requirements and the explicit provision of § 9 (h). The *locus* of the offense has been carefully specified; and only the single act of having a false statement at a specified place is penalized. The rationale of *United States* v. *Lombardo*, *supra*, a case involving a failure to file, is therefore equally applicable here. We conclude that venue lay only in the District of Columbia.

Petitioner also brought here two companion cases arising out of the same trial. In No. 3 he asked for a new trial on the ground of newly discovered evidence. In No. 71 he moved a second time for a new trial on the ground of newly discovered evidence. We granted the petitions in these cases as they were protective of petitioner's rights in the main litigation. 363 U. S. 801. But since our holding in the main case is that venue was improperly laid in Colorado, the judgment of conviction must be set aside. Accordingly the orders in Nos. 3 and 71 denying new trials have become moot and are vacated in the customary manner. In No. 10 the judgment is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 10.—October Term, 1960.

Maurice E. Travis, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[January 16, 1961.]

Mr. Justice Harlan, whom Mr. Justice Frankfurter and Mr. Justice Clark join, dissenting.

Title 18 U. S. C. § 3237 (a) provides in pertinent part:

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United States *begun* in one district and *completed* in another . . . may be inquired of and prosecuted in any district in which such offense was begun . . . or completed." (Emphasis added.)

On my view of the offense with which Travis is charged, I think that under this section the Government was entitled to proceed either in Colorado, where this affidavit was made, or in the District of Columbia, where the affidavit was filed, and therefore dissent from the Court's holding that venue was improperly laid in Colorado.

Section 9 (h) of the Taft-Hartley Act,[1] 61 Stat. 136, provides that the National Labor Relations Board shall

[1] "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated

neither make an investigation nor issue any complaint on behalf of a labor union unless there is on file with it a non-Communist affidavit of the kind here in question. 18 U. S. C. § 1001 [2] is specifically made applicable to such affidavits. That section of the criminal code makes it an offense, in any matter within the jurisdiction of any department or agency of the United States, to falsify a material fact, make a false statement, or make or use any false writing or document. The elements of the crime here involved, therefore, are set out in 18 U. S. C. § 1001, and what § 9 (h) does is simply to supply the "jurisdiction of . . . [an] agency of the United States" required by § 1001.

If this crime may properly be viewed as having been begun in the district of Colorado and completed in the district of the District of Columbia, then venue may be laid in either district under 18 U. S. C. § 3237 (a). Whether that is the proper view of this offense is an issue on which the authorities in this Court are at best inconclusive. In *In re Palliser*, 136 U. S. 257, the Court held that where the defendant had mailed in New York to a postmaster in Connecticut a letter which constituted a

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with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of [18 U. S. C. § 1001] shall be applicable in respect to such affidavits." 29 U. S. C. § 159 (h), repealed by Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, § 201 (d).

[2] "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

prohibited tender of a contract with intent to induce the postmaster to violate his lawful duty, venue could properly be laid in the district of Connecticut. The Court expressly left open the question of whether venue might also have been laid in New York, 136 U. S., at 267–268. To the same effect is *Burton* v. *United States*, 202 U. S. 344. *United States* v. *Lombardo*, 241 U. S. 73, which the Court considers particularly significant, is not controlling, since in that case the offense charged was the *failure* to file with the Commissioner General of Immigration certain information concerning an alien woman whom the defendant was harboring for purposes of prostitution. In such a charge it is difficult to see how the defendant does anything at all except at the place where he fails to file. But cf. *United States* v. *Cores*, 356 U. S. 405. In contrast, the false affidavit in the present case first came into existence in Colorado, having been made and sworn to there.

Nor do the opinions in the lower courts establish anything like a clear line of authority from which it would be unwise now to depart. If anything, I think, they indicate a contrary conclusion to that now reached by the Court. Compare *Henslee* v. *United States*, 262 F. 2d 750; *Miller* v. *United States*, 246 F. 2d 486; *De Rosier* v. *United States*, 218 F. 2d 420; *United States* v. *Downey*, 257 F. 366 and *Bridgeman* v. *United States*, 140 F. 577, *with United States* v. *Valenti*, 207 F. 2d 242.

In these circumstances, the proper course to follow appears to me to be to "determine [the appropriate venue] from the nature of the crime alleged and the location of the act or acts constituting it," *United States* v. *Anderson*, 328 U. S. 699, 703, and that determination should take into account that

> ". . . The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a

remote place. Provided its language permits, the Act in question should be given that construction which will respect such considerations." *United States* v. *Cores*, 356 U. S. 405, 407.

In this kind of a case, prosecution in the district in which the affidavit was executed, most often I would suppose the place where the union offices are located, is more likely to respect the basic policy of the Sixth Amendment than would a prosecution in the district where the affidavit was filed. The witnesses and relevant circumstances surrounding the contested issues in such cases more probably will be found in the district of the execution of the affidavit than at the place of filing which, as in this instance, will often be for the defendant "a remote place." *United States* v. *Cores*, *supra*—that is the District of Columbia where the headquarters of the National Labor Relations Board are located in the case of officers of international unions, or elsewhere throughout the country where the Board has branch offices in the case of local union officers, 29 CFR § 101.3.

This is not to say that venue *must* be limited to the place of execution of the affidavit, but only that there is no lack of consonance with the underlying policy of the Sixth Amendment in permitting venue to be laid there if the elements of the crime allow. *United States* v. *Anderson*, *supra*. In holding that the crime for which this petitioner was prosecuted does not allow venue to be laid in the district of the making of the affidavit, the Court considers the essence of the crime to be the filing of the affidavit, and until that is accomplished it holds that the crime is not even begun. But since it is 18 U. S. C. § 1001 which defines the offense, § 9 (h) only supplying the requisite jurisdiction of the agency of the United States, and since by § 1001 the offense consists of *falsifying* a material fact, *making* a false statement, or *making* or using any false writing or document, it seems eminently

reasonable to consider that the offense is at least definitively begun at the place where the false affidavit is actually made, sworn and subscribed. Cf. the *Henslee*, *Miller*, *De Rosier*, *Downey* and *Bridgeman* cases, *supra*.

It is of course true that the offense is not completed until the affidavit is filed with the Board, but I do not think it adds anything to say, as the Court does, that until such time as the affidavit is filed with the Board there is no matter "within the jurisdiction of any department or agency of the United States." The fact that the filing completes the offense by giving the Board jurisdiction over the matter does not, in my view, detract from the conclusion that the offense was begun when and where the affidavit was executed. Indeed this would seem to be the very type of situation contemplated by 18 U. S. C. § 3237 (a).

Since I consider it would be inappropriate for me, in dissent, to discuss issues which the Court does not reach, I refrain from considering the other grounds for reversal urged by the petitioner.